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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 568

THE UNITED STATES OF AMERICA, *Appellant*,

vs.

SWIFT & COMPANY ET AL.

No. 569.

AMERICAN WHOLESALE GROCERS ASSOCIATION ET AL., *Appellants*,

vs.

SWIFT & COMPANY ET AL.

No. 570.

NATIONAL WHOLESALE GROCERS ASSOCIATION, *Appellant*,

vs.

SWIFT & COMPANY ET AL.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR SWIFT & COMPANY ET AL. AND ARMOUR & COMPANY ET AL., APPELLEES.

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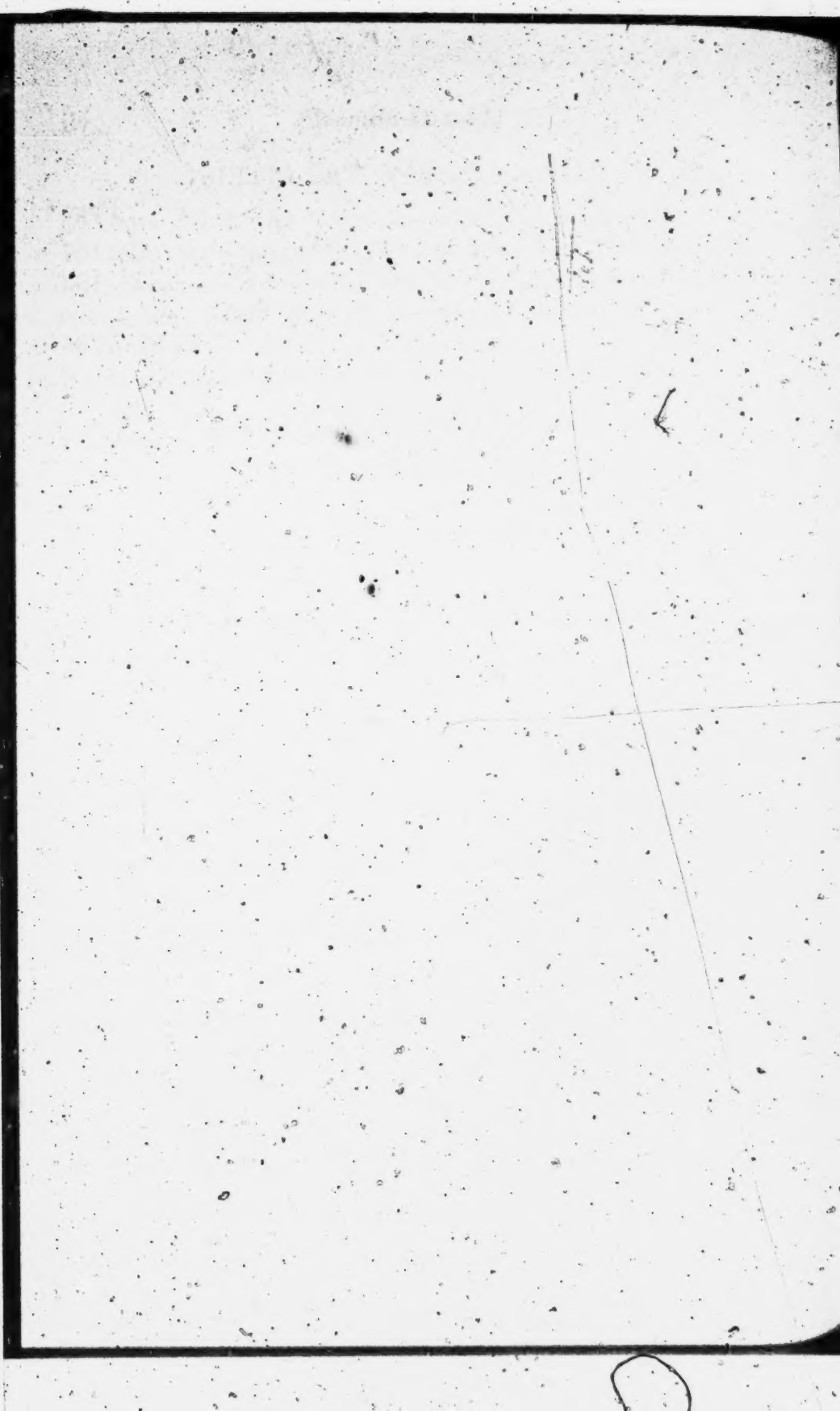
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PRELIMINARY STATEMENT.

Three separate appeals have been taken from the decree of the Supreme Court of the District of Columbia entered

January 31, 1931 (R. 1060), which modified the consent decree of February 27, 1920, to the extent of permitting the appellees to manufacture and to deal at wholesale in the commodities enumerated in the fourth and fifth paragraphs thereof (R. 155-161 and 1060). All appellants seek a reversal of the amendatory decree, but they are not agreed as to the reasons advanced to obtain a reversal. The United States of America was a party to the decree of 1920 and it expressly admits both on the record and in its brief that the trial court had power, without the unconditional consent of the Government,* to modify the 1920 decree upon a proper showing of changed conditions (R. 387-389). The American Wholesale Grocers Association and the National Wholesale Grocers Association were not parties to the 1920 decree but were granted a limited right of intervention in this cause on November 5, 1921 (R. 174, 188), over the objection of the Government (R. 182). Both contend that the 1920 decree cannot be modified without the unqualified consent of the Government. All appellants contend that the proof of changes in conditions from 1920 to 1931 was not sufficient to justify the modification granted by the lower court.

Three separate briefs have been filed by appellants but there is only one record before the court and notwithstanding the divergent views of appellants, we shall reply to their three briefs in a single brief so as to avoid unnecessarily burdening the Court.

An attempt has been made by all appellants to inject into this appeal statements made in *ex parte* investigations of the appellees and other meat packers prior to 1920. There is no proof of such investigations in the record, but the missing evidence is supplied on appeal by references to the Congressional Record, Reports of Senate

*For convenience the United States of America, Appellant in 568 is hereinafter referred to as the Government, American Wholesale Grocers Association, Appellant in 569, is hereinafter referred to as the American Association, and National Wholesale Grocers Association, Appellant in 570, is hereinafter referred to as the National Association.

Committees, Reports of the Commissioner of Corporations, and the Report of the Federal Trade Commission on the Meat Packing Industry.

The limitations upon the purposes for which such references may be used are stated by this Court in *Stafford v. Wallace*, 258 U. S. 495. In that case this Court passed on the constitutionality of the Packers and Stockyards Act of 1921 (42 Stat. 159) and in its statement of the case set forth the meat packer investigations now invoked by appellants, but this Court said in its opinion at page 512:

> "We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees on Agriculture in Congress, but only to enable us to consider and discuss the Act whose validity is herein questioned in the light of the environment in which Congress passed it."

Applying this statement to the instant proceedings, futile must be the obvious endeavor to have this Court consider matter not in the record but imported into the briefs for the thinly veiled purpose of having that matter considered "in deciding the issues of fact" presented.

At page 25 of their brief Government counsel say that the purpose of the consent decree "must be determined upon the allegations of the Government's bill." We agree. The theory and purpose of the decree is clearly and comprehensively shown by the allegations of the petition pursuant to which the decree was entered (R. 1-23). Instead of pursuing the natural course of showing the theory and purpose of the decree by setting forth the allegations of this petition which is in the record, counsel industriously sought references to many sources beyond the record. This course suggests that counsels' motive may have been to convince this court that the charges of unlawful conduct made against the appellees prior to 1920 had some foundation

in fact, and this impression is confirmed by statements such as:

> "This court, in Swift & Company v. United States, 276 U. S. 311, in Note 1, pages 319 and 320, *names violations of law by the packers,* quotes the old case of Swift & Company v. United States, 196 U. S. 375, refers to a case in the District Court against Armour and Company, to the history of the packers contained in Stafford v. Wallace, 258 U. S. 495, to certain reports of Congress and to the report of the Federal Trade Commission on the Meat Packing Industry. *The facts so shown illustrate the character of the packers and establish that they have been law breakers throughout their existence.*" (American Association Brief, page 29.)

This statement takes us far beyond the realm of mere recitals of historical background. Here is a charge that proof exists of *facts* establishing long continued unlawful conduct by appellees. The statement is made on the basis of various *ex parte* proceedings of which there is no proof whatever in the record. The material used to sustain the charge of unlawful conduct was not and could not have been introduced in evidence. This is clearly established by the opinion of this Court in *United States v. International Harvester Corporation,* 274 U. S. 693, at page 703:

> "In support of its alternative contention that competitive conditions have not been established bringing about a situation in harmony with law, the Government relies in large measure upon various statements and tabulations contained in the report of the Federal Trade Commission, which was introduced in evidence over the objection of the International Company. But it is entirely plain that to treat the statements in this report—based upon an *ex parte* investigation and formulated in the manner hereinabove set forth—as constituting in themselves substantive evidence upon the questions of fact here involved, violates the fundamental rules of evidence entitling

> the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination."

The appellants also refer to the decision of this Court in *Swift & Company v. United States*, 196 U. S. 375, as a part of appellees' history prior to 1920, but counsel for the intervener-appellants did not see fit to mention the fact that the decision in that case was based entirely on the pleadings and not on evidence. Neither do they refer to the fact that there was one and only one occasion prior to 1920 when there was an actual trial of charges of violation of the anti-trust laws by the appellees. In 1910 an indictment was returned in the District Court of the United States for the Northern District of Illinois against the principal officers and owners of Swift, Armour, and Morris. This indictment charged the defendants with violations of the anti-trust laws substantially similar to the charges now urged by counsel as so-called historical background. The defendants entered pleas of not guilty. The case was tried, and after the introduction of evidence of all of the acts and transactions set up in the indictment, the trial resulted in an acquittal (R. 67-68).

SUMMARY OF ARGUMENT.

I. The decree of February 27, 1920, does not settle property rights or adjudicate facts but is exclusively an injunctive decree (R. 153-167). This injunctive decree was modified on January 31, 1931, by the court which entered it to the extent of permitting the defendants to deal at wholesale in groceries and other commodities enumerated in the fourth and fifth paragraphs of the decree (R. 1061), and these appeals are prosecuted from said order of January 31, 1931. This modification of the decree was granted because proof of changes in conditions since 1920

established that there was no longer any necessity to enjoin the defendant meat packers from competing in the general food industry (R. 1039-59).

II. The Government did not move to dismiss the petitions for modification but filed answers thereto (R. 321); conceded the power of the court to modify the decree; and consented to modification upon a proper showing of changed conditions (R. 387-89 and 1042). All defendants to the suit in which the decree was entered, consented to modification (R. 1042).

III. The American Wholesale Grocers Association and the National Wholesale Grocers Association were permitted to intervene over the objection of the Government (R. 182) on November 1, 1921 (R. 187), though the final decree had been entered on February 27, 1920 (R. 153). Intervention was allowed only for the limited purpose of being heard and upon the express condition that the interveners should not "take control of the plaintiff's side of the proceeding". (R. 187-8)

IV. The interveners filed motions to dismiss the petitions of Swift and Armour for modification of the decree (R. 310, 313, 315 and 316). These motions were overruled by the lower court (R. 317-19), and interveners filed answers (R. 322, 334, 346 and 368). The interveners now assign the denial of their motions to dismiss as error (R. 122 and 123), and contend that the lower court did not have jurisdiction or power to modify the decree without an unqualified consent by the Government to the particular modification granted. The appellees submit first that this contention is not sound and second that the interveners do not occupy a position which enables them to advance such a contention.

V. Injunctive decrees are always subject to modification because of changed conditions regardless of the expiration of the time for an appeal or bill of review and in spite of an objection to modification by the party who obtained the injunction. A summary statement of the law on

this subject is found in the opinion of the Supreme Court of Pennsylvania in *Ladner v. Siegel*, 298 Pa. 487, 148 Atl. 699:

> "The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be served by a modification, and (b) where the law, common or statutory, has changed, been modified or extended, and (c) where there is a change in the controlling facts on which the injunction rested."

VI. This power of a court of equity to modify injunctive decrees over the objection of a party, is likewise applicable to injunctive decrees entered by consent (*American Press Association v. United States*, 245 Fed. 91), but that question is not here involved because the Government requested the court to treat the 1920 decree as a judicial decree and consented to modification upon a proper showing of changed conditions (R. 387-9).

VII. The court also has power to modify the injunctive decree because of paragraph eighteenth thereof by which the jurisdiction of the court was retained "for the purpose of * * * the carrying out and enforcement of the decree" and also

> "* * * for the purpose of entertaining at any time hereafter any application which the parties may make with respect to this decree."

In *Swift & Company v. United States*, 276 U. S. 311, this Court construed paragraph eighteenth, and held that motions to vacate the 1920 decree, though signed by only two of the parties to that decree, did not constitute a new suit but came within paragraph eighteenth.

VIII. In any event the interveners are not in a position to urge that the decree can not be modified without an unqualified consent by the Government to the modification

granted. The interveners are not parties to the suit. They were granted a limited intervention long after the entry of the decree of 1920 (R. 187). They obtained intervention by a representation that they desired to be heard and produce witnesses in opposition to any modification adverse to their interests (R. 186), and then endeavored to prevent a hearing (R. 310, 313, 315 and 316). Having failed in that attempt the interveners did not call a single witness, or even prove that any member of either of their organizations has an existing business that will be affected in any way by modification of the decree. The Attorney General advised the lower court of the Government's desire for a hearing, stating:

> "* * * because of the importance of the matter involved and the conflicting interests, the matter should be fully heard on the merits by the court. * * *" (R. 388).

The interveners in seeking to prevent such a hearing on the merits violated equity rule 37 which requires that intervention must be "in recognition of the propriety of the main proceeding," and violated the order allowing intervention which expressly imposed the condition that the interveners were "not to take control of the plaintiff's side of the proceeding" (R. 187).

IX. The order of January 31, 1931, should be affirmed because changed conditions have completely removed any danger of monopolistic control of the food industry by the defendants. The petition of 1920 alleged that the defendants had acquired a monopoly in the meat packing industry, and that the Government feared a monopoly by them in the general food industry. Upon that theory the court was asked to prohibit five large corporations from competing in the non-meat food industry. Subsequent events and changes in conditions have established, and all parties have admitted, that the meat packing industry is now highly competitive and that there is no monopoly therein. Sub-

sequent events and changed conditions have also removed any danger of monopoly in the food industry and established that the injunction against the selling of general foods by the defendants is no longer necessary.

A. In 1921 the defendant packers sustained operating losses aggregating $61,002,000 (R. 888a). Morris and Company lost $16,949,000, about one-third of its capital and surplus, in three years (R. 937) and on March 24, 1923, sold its physical properties and business to Armour and Company and discontinued business (R. 964). Armour and Company lost $39,339,000 in 1921 and 1922 (R. 937), and was refinanced in 1922 and changed from a corporation controlled by the Armour family into a public corporation, not so controlled, with 80,000 stockholders (R. 543). Wilson and Company was adjudicated a bankrupt in August, 1924, and its properties were subsequently acquired by a new corporation at a judicial sale (R. 558-9).

B. Since 1920 there has been a pronounced growth in both the volume of business (*infra*, p. 46), and in the earnings (*infra*, p. 52), of the competitors of Swift and Armour. During the same period the defendant packers have been unable to earn profits commensurate with the profits of their competitors, and have failed to effect any substantial increase in their volume of business. In 1929 their position with reference to the total production of meat and lard in the United States as estimated by the United States Department of Agriculture was—Swift 15.2 per cent, Armour 14.1 per cent, Wilson 4.3 per cent, and Cudahy 4.7 per cent (R. 816a).

C. Changes have also occurred in the marketing of livestock. Cooperative sales of livestock on public markets have increased from $37,419,935 in 1920 to $302,894,934 in 1929 (R. 403). Direct sales of livestock have increased to such an extent that 40 per cent of the hogs sold in 1929 were sold direct and never reached public markets (R. 401).

D. Market news has been the subject of radical changes and pronounced development. The petition of 1920 alleged that the ownership of market papers and journals gave the defendant packers peculiar and exclusive access to information of receipts and prices of livestock and enabled them to increase or decrease the flow of livestock to markets (R. 12). At the present time more than 2,400 Government employes are engaged in collecting market information and circulating it daily by 10,000 miles of wires, 90 radio stations, and the issuance of 5,000,000 mimeographed bulletins a year (R. 392). The prompt dissemination of market news now enables producers to select the best selling markets and enables packers scattered throughout the United States to select the best buying markets. As a result the livestock market is now a national market and not a local market and monopolistic control of livestock prices is not possible (R. 536, 659, 422).

E. Public livestock markets have increased in number from 50 in 1920 (R. 15) to 74 in 1929 (R. 818-20). In 1920 the markets were not regulated by any governmental agency but they are now thoroughly regulated and supervised by the Secretary of Agriculture under the Packers and Stock Yards Act adopted August 15, 1921. Offices are maintained at Washington and the principal livestock markets and a large staff of market supervisors, accountants, auditors and engineers are employed (R. 407). The packer buyer is subjected to daily observation and supervision by the Department of Agriculture (R. 409-10) and the rates which stock yard companies are permitted to charge are regulated and fixed by the Secretary of Agriculture (R. 412, *Tagg Bros. & Morehead v. United States*, 280 U. S. 420).

F. The petition of 1920 charged that the defendants had "eliminated competition in the meat products" (R. 17). There are now 998 separate competing meat packing concerns engaged in interstate commerce and regulated under the Packers and Stock Yards Act (R.

411) and also a large but unascertained number of intrastate meat packers, there being 27 such intrastate plants in the City of Detroit alone (R. 444). Numerous competitors of appellees testified that the packing industry is highly competitive and free from any monopoly and no witness testified to the contrary. After this proof had been introduced all parties to this cause entered into a stipulation that all meat packers in the United States owned and controlled independently of each other are in active competition with each other in the purchase of livestock and in the sale of the products thereof (R. 558). The four defendants are owned and controlled independently of each other, (R. 1110). This extensive and active competition in the packing industry has been brought about by natural causes and not by means of the restraints of the decree of 1920 and furthermore no injunctive provision of the decree directed against the packing industry has been disturbed or affected by the modification granted by the lower court.

G. The general food industry has also been the subject of revolutionary changes and a monopoly therein is now impossible. This is established by the undisputed evidence of such witnesses as Frederick S. Snyder, who has been connected with the food industry for forty-three years and was formerly chief of the Meat Division of the Food Administration (R. 467-8); Dr. Paul H. Nystrom, Professor of Marketing, School of Business, at Columbia University (R. 696); Harold H. Maynard, Professor of Marketing at Ohio State University (R. 703); and Fred E. Clark, Professor of Marketing at Northwestern University (R. 704).

The fact that the food industry cannot now be monopolized is so apparent that this Court said, in *Wolff vs. Industrial Court*, 262 U. S. 522, 538:

> "There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is

conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply * * * are countrywide, * * * and the danger from local monopolistic control less than ever."

There are 49,787 establishments engaged in the manufacture of food products (R. 389); the total retail food bill of the country is twenty-four billion dollars (R. 691) and there are more than 6,000 wholesale grocers and over 400,000 retail food stores (R. 519 and 773).

Regular chain grocery stores have increased from 15,000 with sales of $770,000,000 in 1920 to 60,000 stores with sales of $3,500,000,000 in 1929 (R. 567). These 60,000 chain grocery stores are owned by 900 separate corporations, and the 70 largest of the corporations own 48,699 stores, (R. 567).

One chain food organization, The Great Atlantic & Pacific Tea Company had 4,638 stores with sales of $230,420,618 in 1920 and 15,418 stores with sale of $1,053,692,882 in 1929 (R. 494). This concern now has 15 packing establishments under Federal inspection though it had none in 1920 (R. 533) and it has 53 general storage and shipping warehouses (R. 494), 35 bakeries (R. 495), 23 produce warehouses, 6 salmon canneries and other manufacturing establishments (R. 495). Its earnings have increased from $5,803,333 in 1921 (R. 496) to $26,219,631 in the year ended March 1, 1930 (R. 827).

Other large chain organizations have greatly increased the number of stores operated by them, their volume of business and their earnings since 1920. Their earning power is far in excess of the earning power of any of the defendants.

The enormous growth in the number and the volume of business of voluntary chain stores in the food industry has occurred during the last five years (R. 519). There are now in existence 551 voluntary chain organizations

with a total membership of 59,640 separate retail grocery stores (R. 510). One organization, the Independent Grocers Alliance of America, was created in 1926 (R. 762) and the organization now embraces 49 wholesale grocers with 87 wholesale establishments and 9,000 retail stores (R. 562).

At the present time 35 per cent of the total retail grocery business of the United States is controlled by 900 regular chain store organizations operating 60,000 retail stores (R. 519). Approximately 25 per cent of the total retail grocery business is done by the 60,000 retail members of the 551 voluntary chain organizations (R. 519). Therefore 60 per cent of the total retail grocery business of the United States is now in the hands of approximately 1,500 chain organizations, a large percentage controlled by a relatively few organizations.

The growth and development of manufacturers and wholesale distributors of food have also been very pronounced in the last few years. National Dairy Products Company was incorporated in December, 1923, and its sales in 1929 were $300,000,000 and it earned 7.19 per cent on sales (R. 842). The Borden Company increased its sales from $120,293,572 in 1920 to $328,466,989 in 1929, in which year it earned 6.21 per cent on sales (R. 851). The General Foods Corporation is the successor to the Postum Cereal Company and as a result of various acquisitions now handles 68 branded products (R. 854-856). Its sales have increased from $21,910,177 in 1920 to $128,036,791 in 1929, and in that year it earned 15.17 per cent on sales (R. 858).

There is no lack of food production in this country. On the contrary overproduction, largely due to inadequate distribution, is the present problem. Congress has sought to solve the difficulties of overproduction with legislation such as the Capper-Volstead Act (42 Stat. 398) and the Agricultural Marketing Act (46 Stat. 11). The latter statute created the Federal Farm Board and it is at least de-

batable whether this Federal agency, with an appropriation of $500,000,000 at its disposal, has been successful in controlling or stabilizing prices as to a comparatively few agricultural commodities. It is simply inconceivable that the four defendants with a background of losses of $61,000,000 in 1921, a reorganization in 1922, a forced sale in 1923, and a bankruptcy in 1924, could now enter the general food business and seriously threaten a monopoly therein or in any way crush or oppress the financially powerful corporations now engaged in the food industry.

X. The exclusion of the defendants as competitors in the general food industry would inflict an unnecessary injury to the public. The fact that the public in general is injured by a substantial restraint of competition in an essential industry is not reasonably debatable. "Lower prices or improved service are almost an inevitable result of an increased competition" (Dr. Paul H. Nystrom, R. 695).

The prohibition against the sale of general foods by the appellees is also unjust and inequitable to them under present conditions. The record shows beyond dispute that because of changes in conditions the appellees are being subjected to constantly increasing operating costs in their branch house and car route departments which can only be obviated by the handling of a diversified line of products. The maintenance of the appellees' distributing system is essential to the meat packing industry. The increase in the operating cost of this distributing system has been brought about in part by direct shipments of meats to the warehouses of chain organizations. The regular chains alone have increased the number of fresh meat departments operated by them from 1,200 in 1920 to 15,800 in 1929. The voluntary chains which have grown up in the last five years (R. 519) have approximately 28,000 stores with fresh meat departments (R. 512 and 517). Chain organizations purchase their meats through central offices and their direct

shipments to chain warehouses reduce volume in the appellees' branch houses (R. 656).

A further change of major importance affecting the appellees is found in the ever-increasing extent to which chain organizations are performing packing house operations. There are now 30 processing plants under Federal inspection operated by chains as compared with eight such plants in 1920 (R. 533), and there are now at least 83 chain store organizations which perform meat packing operations (R. 921-36).

The increase in motor truck transportation (R. 418) has enlarged the activities of small packers and also caused meat dealers to motor to large cities for their supplies and this development has accentuated the present difficulty of maintaining branch house and car route volume (R. 655 and 670).

In the endeavor to maintain branch house and car route volume under existing conditions the appellees have been compelled to solicit small orders formerly ignored by them. The size of Armour's branch house orders has decreased from 156 pounds per sales ticket in 1920 to 126 pounds per sales ticket in 1929 (R. 656). The size of orders in Swift's branch house and packing house markets has decreased from 117 pounds per sales ticket in 1923 to 93 pounds per sales ticket in 1930, and this has increased the expense of doing business from $.845 per hundred weight in 1923, to $.991 per hundred weight in 1930 (R. 958a). Swift's car route orders have decreased from 206 pounds per order in 1923 to 165 pounds per order in 1929 and the expense of doing business has increased from $.90 to $.95 per hundred weight (R. 958a). Its car route customers have increased from 65,000 in 1925 to 83,000 in 1929. Before 1925 orders for less than 100 pounds in car route territories were not acceptable (R. 665) but in 1929, 35 per cent of its car route orders were for less than 100 pounds each (R. 969-70).

The record shows beyond dispute that the appellees

will be enabled to effect economies of operation in branch houses and car routes by handling a diversified line of products (R. 474, 548, 694-5, 704). This is not denied by the Government but it contends that this method of doing business constituted a competitive advantage in 1920 and is also a competitive advantage today and that therefore the decree should not be modified. However, the reason for the prohibition of 1920 no longer exists. There is no monopoly in the meat packing industry and no danger that such a monopoly or a monopoly in the food industry can now be acquired by the defendants. That being true, an economical method of doing business should not be prohibited. Furthermore, the handling of a diversified line of products by the appellees will not give them any competitive advantage over other meat packers. All other meat packers are now free to engage in the same character of business and there are at least 140 of appellees' competitors now engaged in selling articles which are prohibited to the appellees (R. 919-20).

XI. Under present conditions the use of the defendants' refrigerator cars to transport commodities other than meats will not give them any unfair advantage over the wholesale grocers. The parties have stipulated and agreed that there is an ample supply of refrigerator cars for all who need them (R. 508). The interveners claim that the appellees' route or peddler cars will enable them to obtain quicker and more certain deliveries of groceries than the concerns engaged in the wholesale grocery business. The record shows that the refrigerator cars operated by appellees move on regular schedules in local freight trains without preferential treatment over any other type of car (R. 665 and 675). The Interstate Commerce Commission has decided in *National Wholesale Grocers Association v. Director General, et al.*, 62 I. C. C. 375, that the practice of carriers in permitting the meat packers of the United States to load groceries in their peddler cars does not result in undue prejudice to the wholesale grocers.

Furthermore, the construction of hard roads and the growth of motor truck transportation (R. 418) have removed any possible transportation advantage which the appellees may have had in 1920. The business of the wholesale grocer is particularly adapted to the use of the motor truck in making deliveries and they now have power to expedite their deliveries to any extent they desire. The appellees are now subjected to the payment of penalties to carriers because of their inability to obtain an even and adequate volume of business in car route territories. Grocery items may be used in making up the minimum tonnage or revenue requirements in three of the freight classification territories of the United States, but the handling of those items in such territories will only have the effect of reducing penalties and will not have the effect of reducing freight charges paid by appellees on grocery items.

XII. There is no foundation in fact for the claims of alleged contumacious conduct and violation of Anti-Trust Laws by the appellees. The appellees have not violated the decree of February 27, 1920. Nor have they repeatedly endeavored to destroy the decree as is charged by the interveners. They sought openly, in proper judicial proceedings, to have the decree vacated, their motions being passed on by this Court in *Swift & Company v. United States,* 276 U. S. 311. The appellees made a full disclosure to the trial court of all relevant facts within their knowledge. Reciprocity in buying and shipping which is discussed in the appellees' brief is common to all industries and carriers and has never been held to be illegal by any court. The alleged violations of the Anti-Trust Laws by appellees consisted of three minor instances, unknown to appellees' officers, and characterized by the lower court as sporadic, in view of the nation-wide extent of the appellees' business. As the trial court found appellees' officers have expressly forbidden unfair practices (R. 1051). The few instances complained of are trivial, particularly in

view of the announcement of the Attorney General at the beginning of the hearing that he intended to present to the court "every justifiable argument and fact which tends to the conclusion that the decree should not be modified" (R. 1052).

There is no longer any reason which requires that competition in the general food industry shall be restricted by the exclusion of the defendants as competitors, and in the public interest, and in justice and equity to the defendants, the order of January 31, 1931, should be affirmed.

ARGUMENT.

PART I: THE POWER OF THE COURT TO MODIFY THE DECREE.

I. The Government Consented to a Modification of the Consent Decree Upon a Proper Showing of Changed Conditions.

When the petitions for modification of the consent decree were filed by the appellees, the Government as a party to the decree could have unconditionally consented to the modification requested, and had that been done, there would have been no litigation. Instead of thus consenting, the Government could have expressly refused to consent to modification, and had that been done there would have been presented the question of whether or not an injunctive decree entered by consent can be modified by the court which entered it, over the objection of a party, on the ground of changes in conditions rendering the continuance of the decree unnecessary. The Government did not elect to pursue either of these courses but filed an answer demanding proof of the allegations of the petitions for modification (R. 321) and then requested the court to treat the decree as a purely judicial decree, to be modified if the evidence presented justified modification upon the application of accepted principles of equity (R.

387-9). In taking this position the Government in effect agreed that if the allegations of the petitions for modification were proved, the decree should be modified. Had the Government been of the opinion that the allegations of the petitions did not justify modification upon accepted principles of equity, and had that view been sound, there would have been no necessity for the hearing and the voluminous record now before this Court. The question of whether or not the allegations of the petitions justified modification was a "point of law arising upon the face of the bill" and under Equity Rule 29 such a contention should have been presented by motion to dismiss on the ground of the insufficiency of the facts pleaded.

In the opening statement made in this cause on behalf of the Government, Mr. Teegarden advised the court of the Government's position as to the modification requested by appellees by reading to the court extracts from a letter of the Attorney General of the United States to the President of the Senate on July 11, 1930:

> "With respect to the attitude of this Department toward the petitions of Armour and Company and Swift & Company for modification of the Consent Decree, I have declined to entertain any suggestion that I stipulate for any modification of this decree. I have taken the position that the decree, although entered by stipulation and consent, is a judicial decree to be dealt with as such; that either by virtue of the clause at the foot of the decree reserving jurisdiction, or by virtue of general equity powers, or both, the Court has jurisdiction to entertain a petition for modification on a proper showing; that because of the importance of the matter involved and the conflicting interests, the matter should be fully heard on the merits by the Court, and no modification of the decree made unless on such a judicial hearing and without any stipulation by, or consent from, the United States the evidence presented justifies, upon application of accepted principles of law and equity, some modification." (R. 387-388)

On the following day the trial court referred to the above-quoted statement of the Attorney General and the following occurred:

> "The Court: I think I understand fully the Government's position, and as I read this, it concedes that the Court has jurisdiction, upon a proper showing, to modify the decree.
> "Mr. Teegarden: That is our very frank position, Your Honor." (R. 389)

The consent of the Government to modification of the consent decree upon a proper showing is further amplified in the brief filed by the Government in the trial court, which is quoted in the opinion of the court rendered January 5, 1931:

> "The decree is a judicial decree, and to be dealt with as such. The fact that it originated in a consent arrangement does not give any greater or less effect to the attitude of the Attorney General on the question of modification, than if the decree was entered after litigation. The question whether there should be a modification is a judicial question to be decided on the law and the evidence. Arguments advanced for or against the application by any of the parties including the Government are to be weighed by the Court and given the same consideration, no more and no less, than they would if the decree had followed litigation." (R. 1042)

The District Court, after quoting the foregoing from the Government's brief, said in its opinion:

> "I agree with the Government's position on this point, for a decree of injunction differs from a judgment at law, and while it is a final adjudication of the rights and equities of the parties at the time it is entered, the remedy by injunction is subject to modification upon equitable considerations which may thereafter arise due to subsequent changes in conditions." (R. 1042-3)

The 23rd finding of fact made by the District Court is—

> "All parties consenting to the decree entered herein February 27, 1920, concede the jurisdiction and power of this Court to modify said decree." (R. 1114)

At page two of the Government's brief filed in this Court the following statement appears:

> "The Government has conceded that the power of the Court to modify the consent decree is the same as its power to modify a decree entered after litigation."

The Government has definitely and repeatedly waived any objection to modification of the decree on the ground that it is a consent decree. There is no doubt that such a waiver is effective and binding. In *Hollins v. Brierfield Coal and Iron Company*, 150 U. S. 371, this Court said at page 380:

> "Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of the Courts of Equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal."

The Government having requested the court to pass upon the merits of the petitions for modification, the interveners, who obtained a limited right of intervention long after the decree was entered cannot take a contrary position (R. 188).

When the Grocers Associations were permitted to intervene, the court below expressly provided in its order that they "be allowed to intervene, not to take control of the plaintiff's side of the proceedings, but for the limited pur-

pose stated in their petition" (R. 187). And in its opinion in the instant proceeding the court said:

> "* * * I do not think that the interveners have such a position in this case as to entitle them to prevent modifications by the Court, when the power to make them is conceded by the parties to the Decree." (R. 1043).

The intervener-appellants contend that the Government could not by consent confer jurisdiction on the court to treat this decree as a judicial decree because of the rule of law that jurisdiction cannot be conferred by consent. That rule has no application in this case. The court undoubtedly had jurisdiction of the persons and of the subject-matter and the amendatory order was not of a type which was beyond the limits of the power of the court under existing law.

II. The Court Has Power to Modify the Decree of 1920 Upon Accepted Principles of Law and Equity.

A. INJUNCTIVE DECREES ARE ALWAYS SUBJECT TO MODIFICATION BECAUSE OF CHANGED CONDITIONS REGARDLESS OF THE EXPIRATION OF THE TIME FOR TAKING AN APPEAL.

There are, of course, numerous final decrees entered by courts of equity which serve their purpose when executed and cannot thereafter be questioned except by means of an appeal taken within the time permitted by law or a bill of review. This is true of all decrees which settle and determine property rights. An entirely different situation exists in the case of injunctive decrees. An injunctive decree is a continuing decree. It looks entirely to the future. In the language of this Court in *Swift & Company v. United States*, 276 U. S. 311, 326, "A suit for an injunction deals primarily not with past violations but with threatened future ones." Because an injunctive decree operates in the future, it is necessarily subject to future changes in

either law or facts which render the continuance of the decree unnecessary and prejudicial. The decisions uniformly recognize the power of courts of equity to vacate or modify final injunctive decrees at any time on the ground of changed conditions.

In *Lowe v. Prospect Hill Cemetery Association,* 75 Neb. 85, 106 N. W. 429, a perpetual injunction had been issued, restraining the defendant from using certain land for burial purposes. Such injunctive decree had been previously affirmed on appeal (58 Neb. 94; 78 N. W. 488). Several years thereafter a motion was filed to modify or vacate the permanent injunction and it was contended that the court had no power to vacate or modify its final decree after the term at which it was entered. The Supreme Court of Nebraska said:

> "We are satisfied that where a final decree has been rendered allowing a permanent injunction, as in this case, the court granting it possesses the undoubted power to either vacate or modify when the circumstances and situation of the parties have so changed as to render such action just and equitable, and this even though the statute may not have specifically provided for the exercise of such power."

In *Larson, et al. v. Minnesota Northwestern Electric Railway Co.,* 136 Minn. 423; 162 N. W. 523, the court had entered a final decree enjoining the defendant railroad company from occupying a city street with its tracks. At a subsequent term the court below modified the final decree because of changes in conditions since its entry. The court said in its opinion:

> "The modification of this judgment was a proper exercise of the discretion of the court. A judgment ordering a perpetual injunction is not above the power of the court to ever alter or amend. Facts may arise after the judgment is rendered of such a nature that the judgment ought not to be executed,

> and in such event, modification of the judgment may be a matter of right. Weaver v. Mississippi & Rum River Boom Co., 30 Minn. 477, 16 N. W. 269; Colstrum v. Minneapolis & St. Louis Railway Co., 33 Minn. 516, 24 N. W. 255."

In the case of *Emergency Hospital v. Stevens,* 146 Md. 159; 126 Atl. 101 the Court of Appeals of Maryland had precisely the same question before it and came to the same conclusion.

In *Ladner v. Siegel,* 298 Pa. 487, 148 Atl. 699, the court granted an injunction restraining the use of a building in a residential district for garage purposes and this injunctive decree was affirmed on appeal (293 Pa. 306, 142 Atl. 272). Subsequently the defendant was adjudged guilty of contempt for violating the injunction and on appeal the contempt order was affirmed (296 Pa. 579, 146 Atl. 710). Thereafter the defendant applied for a modification of the final injunctive decree so as to permit the use of the building for the storage of automobiles owned by tenants of nearby apartments. In affirming an order granting the modification requested, the Supreme Court of Pennsylvania said that when the decree was entered it was the law of the State of Pennsylvania that the operation of a public garage in an exclusively residential district was a nuisance *per se.* This rule of law was later changed because the increased use of the automobile as a means of transportaiton rendered the employment of property in business and residential districts for garage purposes a necessity. Because of this change in conditions and in the law, the Supreme Court of Pennsylvania upheld the modification of the final injunctive decree and said in its opinion:

> "The modification of a decree in a preventive injunction is inherent in the court which granted it, and may be made, (a) if, in its discretion judicially exercised, it believes the ends of justice would be

served by a modification, and (b) where the law, common or statutory, has changed, been modified or extended, and (c) where there is a change in the controlling facts on which the injunction rested."

The plaintiffs in *Ladner v. Siegel, supra,* were the owners of property adjoining the defendant's proposed garage and contended that the final decree could not be modified because it created in them a property right protected by the 14th Amendment to the Federal Constitution. In response to this contention the Supreme Court of Pennsylvania said:

"An injunction decree does not create a right; it protects the right of the owner to the enjoyment of his property from injurious interference by the uses of other land. The right protected is an attribute of property existing through the application of common-law principles. A decree preventing its injury does not give to the complaining party a perpetual or vested right either in the remedy, the law governing the order, or the effect of it. He is not entitled to the same measure of protection at all times and under all circumstances. A decree protecting a property right is given subject to the rules governing modification, suspension, or dissolution of an injunction. The decree is an ambulatory one, and marches along with time affected by the nature of the proceeding."

Ladner v. Siegel, supra, is reported in Volume 68 of American Law reports at page 1172 with annotations discussing the reported cases at page 1180. With respect to the power of a court of equity to modify the terms of a permanent injunction the annotator says:

"The cases seem to be uniform in holding that the Court which rendered a decree for a permanent or perpetual injunction may open or modify the same where the circumstances and situation of the parties are shown to have so changed as to make it just and equitable to do so."

The power of a court of equity over an injunctive decree exists as long as the decree itself exists. The words "perpetual" and "permanent" applied to a strictly prohibitory decree are misnomers. Text writers have recognized this fact. There appears in Vol. 23 of Michigan Law Review at page 382, an article entitled, "Are All Permanent Injunctions Temporary?" The author says in part:

> "an injunctive decree should not be conclusive when there have been material changes in the conditions upon which the injunction was based. Neither at law nor in equity does the principle of *res judicata* prevent the showing of changed relations due to facts which have subsequently transpired. The only peculiarity of an injunctive decree is that it *purports* to conclude future relations between the parties. But it should be understood as concluding future action only so long as the material facts remain the same. * * * Why should the restraining hand of an injunction extend into the indefinite future, prohibiting an act when the necessity for the prohibition has ceased?"

B. INJUNCTIVE DECREES ENTERED BY CONSENT ARE ALWAYS SUBJECT TO MODIFICATION BECAUSE OF CHANGED CONDITIONS.

It is contended, however, that a different rule prevails in this case because the decree of February 27, 1920, is a consent decree. As heretofore stated, the question of whether or not a consent decree can be modified on the ground of changed conditions in spite of an objection to such modification by one of the parties, is not before this Court. The Government does not object to modification on the ground that the decree is a consent decree. It has specifically requested the court to treat it as any other judicial decree. However, even if the contrary were true the amendatory decree of the lower court would be valid because as a matter of law an injunctive decree, even though entered by consent, can be modified because of changed conditions, notwithstanding an objection to modification

by a party to the decree. Counsel for the National Association assert the contrary and cite numerous authorities to support their position at page 9 of their brief. In selecting these authorities counsel overlooked the fact that the consent decree herein is an injunctive decree. It is, of course, true that a consent decree which settles and determines property rights can not be modified on the ground of changed conditions without the consent of all parties. Counsel carefully refrained from stating the facts involved in any of the cases relied on by them. We show in a foot note that each and every case cited involved a consent decree, which settled and determined property rights.*

There are several decisions of the Federal Courts to the effect that final injunctive decrees entered by consent may be modified because of changed conditions even though a party objects to modification.

In *American Press Association, et al, v. U. S.*, 245 Fed. 91 (7th C. C. A.), the court modified an injunctive consent decree more than 5 years after the entry thereof, though the United States, one of the parties to the decree, opposed the request for modification. On August 3, 1912, the Government instituted a suit in equity against the American Press Association, the Western Newspaper Union and others to enjoin threatened violations of the Sherman Anti-Trust Law. On the same date the District

*City of Des Moines v. Des Moines Water Co., 218 Fed. 939, 230 Fed. 570 (consent decree fixing the amount of a condemnation award); Karnes v. Black, 185 Ky. 410 (consent order dismissing a suit to recover an interest in a decedent's estate); Horning v. Saginaw Circuit Judge, 161 Mich. 413 (consent decree to pay $6,000); Lentz v. Lentz, 194 N. C. 673 (consent decree for the payment of lump sum alimony); First National Bank v. Mitchell, 191 N. C. 190 (consent decree directing the sale of land to pay debts); Edney v. Edney, 81 N. C. 1 (consent decree directing sale of property and disposition of proceeds); Stites v. McGee, 37 Ore. 574 (consent decree fixing amounts of water rights); Outlaw v. Barnes, 118 S. C. 189 (consent decree for partition); Morris v. Peyton, 29 W. Va. 201 (consent decree for the payment of money); Seiler v. Union Manufacturing Co., 50 W. Va. 208 (consent decree directing the sale of property); McGraw v. Traders National Bank, 64 W. Va. 509 (consent decree providing for the redemption of bonds); Bank of Glade Springs v. McEwen, 160 N. C. 414 (consent decree directing sale of property and disposition of proceeds).

Court entered a consent decree which permanently restrained the Western Newspaper Union—

> "(a) From combining or attempting to combine with the American Press Association, either *by purchase,* stock ownership, or in any other manner; * * * (c) from selling any of its products or services at less than a fair and reasonable profit, or at cost, or less than cost, with the purpose or intent of injuring or destroying the interstate trade and commerce of the American Press Association or of any other competitors."

On May 9, 1917, the American Press Association filed a petition in the original suit praying for a modification of this injunction on the ground of changed conditions. Evidence heard by the District Court showed that because of changed conditions in the stereotyped plate business, the American Press Association was losing money at the rate of $3,000 a month. The company desired to discontinue business and asked that the consent decree be modified so as to permit a sale of its business as a going concern, to its only competitor, the Western Newspaper Union. The modification thus sought was directly contrary to the provision of the consent decree which perpetually enjoined the Western Newspaper Union from combining with the American Press Association "either by purchase, stock ownership or in any other manner." The Court of Appeals held that the consent decree should be modified because of changed conditions and that the parties should be permitted to do that which was expressly prohibited by the consent decree entered five years before. The court said at page 93:

> "Since the outbreak of the world war there has been an increasing scarcity of print paper, and mounting prices. Few new country newspapers are being started; many have reduced their sizes; quite a number have quit. This condition brought the American

Press Association's plate business to a loss of over $3,000 a month, which is progressively increasing, and has also made it impossible for that company to build a ready-print business to help bear the overhead. The directors have decided to wind up the plate business as speedily as possible, whatever may be the outcome of this proceeding.

* * * * * * * * * *

If it were not for provision (a) of the decree, and the law back of it, these two companies might get together and fix a price that would provide a reasonable profit to the American company and an unreasonable one to the Western. For the newspapers, and through them the public, to pay for the profitable operation of an inefficient concern is an injury. And a combination to that end would be an unreasonable restraint of trade. That course can not be pursued. And, because it can not, the American company is forced to go out of the plate business. No decree can stop that. And after the American company quits, if the Western is left alone in the field, the ultimate situation of the country newspapers would be the same whether the plant be scrapped or sold as an integer. Neither the decree nor, in our judgment, the Sherman Law, prevents the Western from buying the scraps piece-meal. * * * If it be permitted to buy the integer, it would save the expense of reorganization. If the plant be scrapped, two injuries result: One to the public from the destruction of a usable and useful plant; the other to the stockholders of the American Company.

As to the first, a law designed to shield the public from injury should not be construed to compel the public to suffer an injury. As to the second, the Sherman Law, in our opinion, does not require the stockholders of a company, even a company that was a self-confessed wrongdoer in 1912, to sustain a loss in 1917 arising without wrongdoing, if that loss can be prevented without injury to the public. Injury can be prevented, we believe, by attaching to the permission to buy the plant as a going concern a condition which should be read in the light of provision (c) of the injunction."

Counsel for the American Association at page 17 of their brief attempt to distinguish the decision in the *American Press Association case* on the ground that the original decree "merely required enforcement in order to accomplish what the defendant in the original suit desired and sought." The granting of permission to do an act expressly prohibited by the original decree can not properly be characterized as "enforcement". The enforcement which counsel has in mind was accomplished by imposing a condition on the permission granted, as is stated in the last sentence quoted from the Court's opinion.

Counsel for the National Association seek to distinguish the *American Press Association case* on the ground that the power to modify without consent was not discussed in the court's opinion. *Webster v. Fall*, 266 U. S. 507, 511, is relied upon to establish that questions "which merely lurk in the record" are not to be considered as having been decided. However, the question of the power of the court to modify the consent decree over the objection of the Government, was the only point involved in the *American Press Association case* and certainly did not "lurk" in the record.

The District Court in this case drew, among others, the following conclusions of law:

> "3. This Court has inherent power to modify its said injunctive decree in such respects as the Court find justified in the public interest and in justice to the defendants.
>
> "4. The consent of the United States and all other original parties who consented to the entry of said Decree is not necessary to the exercise of the Court's aforementioned power to modify." (R. 1114)

The Government neither excepted to (R. 1115) nor assigned error upon these conclusions. (R. 1118-20)

The Federal Courts which have had occasion to pass upon the question have uniformly held that consent de-

crees entered in anti-trust proceedings may be modified upon a proper showing of changed conditions even if the Government expressly refuses to consent to modification. *United States v. New York, New Haven & Hartford R. R. Co. et al,* D. C. S. D. of N. Y. Equity Cause 11,301 (not reported). *U. S. v. Discher, et al.,* 255 Fed. 719, D. C. S. D. N. Y.; *U. S. v. Dupont De Nemours & Co., et al.,* 273 Fed. 869, D. C. D. of Del. See also *Marietta Chair Co. v. Henderson,* 121 Ga. 399, 49 S. E. 312.

C. THE COURT ALSO HAS POWER TO MODIFY THE 1920 DECREE BECAUSE OF THE PROVISIONS OF PARAGRAPH EIGHTEENTH THEREOF.

The power and jurisdiction of the court below to entertain the petitions for the modification of the consent decree are established beyond any question by the waiver of the Government and the decisions heretofore discussed. Even if this were not true, the lower court had power to entertain the petitions for modification solely on the ground of the provisions of paragraph Eighteenth of the decree of February 27, 1920, and the decision of this Court with reference thereto. Paragraph eighteen of the consent decree provides—

> "That jurisdiction of this cause be, and is hereby, retained by this court *for the purpose of* taking such other action or adding at the foot of this decree such other relief, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree *and for the purpose of* entertaining at any time hereafter any application which the parties may make with respect to this decree." (Italics ours.)

This paragraph shows that the court retained jurisdiction for two separate and distinct purposes. The italicized phrase "for the purpose of" is repeated. The court retained jurisdiction, first, "for the purpose of * * * the carrying out and enforcement of this decree", and second, "for the purpose of entertaining at any time hereafter

any application which the parties may make with respect to this decree."

Among the District Court's conclusions of law there will be found these:

> "2. This Court has power in virtue of the provisions of Paragraph Eighteenth of its Decree entered herein February 27, 1920, to modify said Decree in such respects as the Court finds justified in the public interest and in justice to the defendants."
>
> "5. The provisions of Paragraph Eighteenth of said Decree constitute consent by all of the parties that the Court may entertain at any time any application for modification of the Decree and enter its order thereon." (R. 1114)

The Government neither excepted to (R. 1115) nor assigned error upon these conclusions (R. 1118-20). Indeed, as hereinbefore shown, the Attorney General in his statement read to the District Court said:

> "I have taken the position that the Decree, although entered by stipulation and consent, is a judicial decree to be dealt with as such; that either by virtue of the clause at the foot of the decree reserving jurisdiction, or by virtue of general equity powers, or both, the Court has jurisdiction to entertain a petition for modification on a proper showing * * *." (R. 388)

Paragraph eighteenth of the consent decree was construed by this Court in *Swift & Company v. United States*, 276 U. S. 311, and the opinion of this Court in that case disposes of the contention that the language of paragraph eighteenth is not sufficiently broad to authorize the petitions for modification. In the *Swift case* this Court passed upon the motions of the present Appellees to vacate the consent decree on the ground that it was void. In considering the question of whether an appeal from an order denying the motions came within the provisions of the Expediting Act, this Court held that it was unneces-

sary to determine whether motions to vacate a decree in an anti-trust proceeding constituted a distinct and separate suit beyond the scope of the Expediting Act, because the motions to vacate came directly within the provisions of the above quoted paragraph eighteenth of the decree. The Court said at page 322:

> "Swift and Armour answer that the motions to vacate the consent decree are not subject to the provisions of the Expediting Act because they are not a part of the suit filed February 27, 1920, under the Anti-trust Act, but constitute a new suit. Compare Stevirmac Oil & Gas Co. v. Dittman, 245 U. S. 210. The argument is that the original suit ended with the entry of the consent decree, or at all events, at the expiration of the term, or at the end of the 60 days from the entry of the decree allowed by the Expediting Act for an appeal. We need not enquire whether an independent suit to set aside a decree entered under the Anti-Trust Act is subject to the provisions of the Expediting Act. The consent decree provided by paragraph Eighteenth for 'entertaining at any time hereafter any application which the parties may make with respect to this decree.' Swift and Armour made these motions to vacate in the original suit; they arose out of the three proceedings for intervention filed after entry of the consent decree; and they were entitled in the original cause."

Counsel for the National Association contend (brief page 12) that in construing the words "the parties" in the last line of paragraph eighteenth, the definite article "the", being used before a plural noun, should be construed to mean "all the parties". A complete answer to this contention is found in the opinion of this Court in *Swift & Company v. United States*, 276 U. S. 311. This Court decided that motions to vacate the consent decree filed by only two of the parties to that decree were directly within that portion of paragraph eighteenth providing that jurisdiction be retained for the purpose of

"entertaining at any time hereafter any application which the parties may make with respect to this decree." The court held that this language was sufficiently broad to permit two of the parties to the decree to apply for a complete vacation of the decree. If the court has power under paragraph eighteenth to entertain motions made by two parties to vacate the decree, it certainly also has power thereunder to entertain motions for the modification of the decree filed by the same parties.

III. The Intervener-Appellants Were Permitted to Intervene for a Limited Purpose Long After the Decree of 1920 Was Entered and Are Not in a Position to Urge that the Decree Cannot be Modified Without an Unconditional Consent by the Government.

The consent decree was entered on February 27, 1920 (R. 167). On September 10, 1921, the American Association (then known as Southern Wholesale Grocers Association R. 190) filed a petition for leave to intervene (R. 170). On the same date an order was entered granting leave to intervene and a petition in intervention was thereupon filed (R. 174-175). On September 19, 1921, a similar petition for leave to intervene was filed by the National Association (R. 179). The petition of September 10, 1921, was filed and the order of that date permitting intervention was entered without notice to the Government or the defendants and on September 24, 1921, the Government filed a motion to set aside and vacate the order which granted intervention (R. 182). On October 13, 1921, prior to the hearing of this motion to vacate, the American Association filed an amended petition in intervention (R. 183).

A. THE INTERVENER-APPELLANTS OBTAINED LIMITED INTERVENTION BY MEANS OF REPRESENTATIONS THAT THEY DESIRED TO BE HEARD AND TO PRODUCE WITNESSES TO TESTIFY REGARDING ANY MODIFICATION OF THE CONSENT DECREE, ADVERSE TO THEIR INTERESTS.

The amended petition in intervention filed by the American Association on October 13, 1921, alleged that the interveners had been informed and believed that the Department of Justice had prepared a motion to modify the decree of February 27, 1920, and that the Department intended to conduct a hearing before an Interdepartmental Committee with reference thereto and further alleged:

> "Interveners are advised, and being so advised, allege that the said board before which it is proposed to grant interveners a hearing, is a non-judicial board, with no power, authority or jurisdiction to hear or decide the rights of these interveners; that said board could not subpoena or swear witnesses, and that only in this court and cause can the facts necessary to a proper determination of the issues herein be adduced, and interveners here and now offer at such time and place as the court may set, to produce witnesses who will testify to the facts, material and necessary, for the court to know before determining what modification, if any, should be permitted of said decree. The proposal of the Department of Justice to grant the form of a hearing as aforesaid to interveners, and to determine for itself by an agreement with the defendant what modification shall be made in said decree, denies interveners that due process of law and that hearing which they are entitled to have, and which they can not obtain except before this Court and in this cause." (R. 186)

On November 1, 1921, the District Court rendered its decision on the Government's motion to vacate and set aside the order of September 10, 1921, permitting intervention. The Government's motion was overruled, but the court in its opinion clearly and definitely limited the scope of the intervention permitted by stating:

"Without deciding that petitioners have an undeniable legal right to intervene, it is considered that upon the facts alleged in their petition it is fair and just that they should be allowed to intervene, not to take control of the plaintiff's side of the proceedings, but for the limited purpose stated in their petition, namely, to be heard in opposition to any modification of the decree that would deprive them of the protection now secured by it * * *." (R. 187).

On November 5, 1921, the District Court entered an order allowing the National Association to intervene under the same limitations (R. 188) and a petition in intervention was filed by the National Association on November 8, 1921 (R. 189).

There are two types of intervention in equity suits, namely, general intervention and limited intervention. In general intervention the intervener becomes a party to the suit for all purposes. Courts frequently refuse to permit a general intervention, and allow a limited intervention on certain conditions or for a specific purpose (*Florida v. Georgia*, 17 How. 478, 495; *Leary v. United States*, 224 U. S. 567, 576; 21 Corpus Juris, pp. 341 and 345).

In this case the court obviously could not have permitted a general intervention. The petition for leave to intervene was filed more than a year and a half after the entry of the final decree. Intervention after final decree is very unusual and is seldom permitted even in courts of equity (*United States v. Northern Securities Company*, 128 Fed. 808, 810, C. C. S. D. Minn.; *Caldwell v. Guardian Trust Company*, 26 Fed. (2d) 218, 222, 8th C. C. A.; 21 Corpus Juris, page 345).

B. THE INTERVENERS HAVE REPEATEDLY ENDEAVORED TO PREVENT A HEARING ON THE MERITS OF THE PETITIONS FOR MODIFICATION.

On April 2, 1930, the appellees filed their amended petitions to modify the consent decree on the ground of

changes in conditions since the decree was entered in 1920 (R. 200 and 255). On April 12, 1930, both the American and the National Associations filed motions to dismiss the petitions for modification (R. 310, 313, 315 and 316), and on the same date the Government filed answers to the petitions for modification (R. 321). Inadvertently the Government incorrectly states in its brief, at page 8, that its answers were not filed until after the court had overruled the interveners' motions to dismiss. The Government's answers were filed on April 12, 1930 (R. 321), and the court's opinion overruling the interveners' motions to dismiss was rendered June 28, 1930, and the answers previously filed by the Government are quoted in this opinion (R. 317).

In filing motions to dismiss the petitions for modification, the interveners acted contrary to the representation made by them in order to obtain intervention. They sought and obtained intervention by means of a representation that they wished to be heard and to produce witnesses to testify to facts relating to any modification of the decree adverse to them (R. 186) and after thus obtaining intervention endeavored to prevent a hearing on the merits by means of motions to dismiss. The Government desired a hearing, and contrary to the court's order allowing intervention the interveners sought "to take control of the plaintiff's side of the proceeding" (R. 187), and to prevent the hearing which the Government wanted.

The trial court overruled the interveners' motions to dismiss the petitions for modification (R. 317-319) but the interveners continued in their attempts to prevent a hearing on the merits. When the first witness was called by appellees the National Association tried to prevent the introduction of any testimony by interposing objections based on the same grounds as were advanced in its motions to dismiss (R. 382-387) and did this notwithstanding the fact that counsel for the Government had previously

admitted the power of the court to modify the decree upon a proper showing and had presented to the court a written statement from the Attorney General of the United States stating in part:

> " * * * because of the importance of the matter involved and the conflicting interests, the matter should be fully heard on the merits by the court * * *." (R. 388)

The effort to prevent the introduction of any evidence failed and a lengthy hearing followed but the interveners did not call a single witness. They did not even prove how many of their members are engaged in the wholesale grocery business or that there is any member of either Association having an existing business which will be injured or affected by the modification of the decree. No witness is identified as belonging to or having any connection with the intervening Grocers Associations, nor is there a word of evidence showing any interest of interveners or any of their members in the maintenance of the 1920 decree. At the conclusion of the hearing the interveners having offered no testimony excused their failure to carry out the representations upon which they secured intervention, by stating that any evidence they might offer would only be cumulative to that introduced by the Government (R. 807).

Having failed to prevent a hearing in the trial court the interveners now seek to prevent this Court from passing on the merits of the question of whether or not the decree of January 31, 1931, should be affirmed. Both interveners have assigned as error the action of the trial court in refusing to sustain their motions to dismiss (R. 1120-23) and maintain—contrary to the position taken by the Government—that the 1920 decree cannot be modified without an unconditional consent by the Government.

The Government having consented that the court may act and having requested the court to pass upon the merits

of the petitions for modification, the interveners have no right to question the power of the court contrary to the position of the Government. Doing so violates the representation by which they obtained intervention and the condition upon which intervention was granted them. Moreover, their position would be the same even if the court had not definitely said that they were not to take control of the plaintiff's side of the proceeding.

In *Central Trust Co. v. McGeorge*, 151 U. S. 129, a suit was instituted in the Circuit Court of the United States for the Western District of Virginia, although neither the plaintiff nor the defendant was a resident of that district. The defendant did not plead its exemption from being sued in that district but filed an answer to the bill of complaint. Thereafter, certain stockholders and creditors of the defendant corporation intervened in the cause and raised the objection that a Federal Court of a district where neither the plaintiff nor defendant resided, had no jurisdiction to proceed. This court held that the exemption from suit outside the district of defendant's domicile could be, and had been waived, and said at page 135:

> "It is scarcely necessary to say that, as the defendant company had submitted itself to the jurisdiction of the court, such voluntary action could not be overruled at the instance of stockholders and creditors, not parties to the suit as brought, but who were permitted to become such by an intervening petition."

There is a further reason why the interveners had no right to move to dismiss the petitions for modification. Equity Rule 37 provides for intervention in equity suits but only on condition that "the intervention shall be in subordination to and in recognition of the propriety of the main proceeding." An intervener cannot question the power of the court to proceed with the matter which was the occasion of his intervention. The occasion of the intervention in this cause was that the interveners had been

informed that the Government contemplated a modification of the decree (R. 185). Intervention sought and obtained for the purpose of being heard with reference to a proposed modification of a decree cannot be utilized to prevent a hearing on the question of whether the decree should or should not be modified.

C. THE CLAIMS OF INTERVENERS THAT THEY ABANDONED REMEDIES UPON THE ASSUMPTION THAT THE INJUNCTIVE DECREE OF 1920 WOULD CONTINUE IN PERPETUITY.

The interveners contend that they have abandoned remedies upon the assumption that the decree of 1920 would continue in effect forever. The American Association states at page 8 of its brief that

> "Prior to 1917, wholesale grocers experiencing the adverse effect of the power and practices of the Big Five, presented their difficulties to the President."

The statement is made as a part of the so-called chronological history in order to create the impression that the interveners were instrumental in obtaining the decree of 1920. No record reference is given to support the above-quoted statement and none can be given. However, even if the statement were supportd by the record, the interveners would not have a right to insist upon the maintenance of the injunction in perpetuity. In *Ladner v. Siegel*, 298 Pa. 487 *supra*, the complainant obtained the injunction for the express purpose of protecting his own property. Nevertheless, the Supreme Court of Pennsylvania held that the injunctive decree obtained by the complainant to protect adjacent property owned by him, did not create a vested right.

Interveners further contend that the Packers and Stockyards Act of 1921 (42 Stat. 159) was made less comprehensive than it would have been because Congress acted on the assumption that the consent decree would continue in effect forever. The claim is made that the statute is limited

in scope to the meat industry and has no application to packers when handling food items other than meats (Government brief, p. 63; National Association Brief, pp. 17 and 46, American Association brief, p. 41). The assertion that the present statute is subject to this construction is made without the citation of any authority or even the quotation of the statute itself. The record is referred to (R. 414) but all that appears from the record is that the Secretary of Agriculture has never attempted to exercise such jurisdiction and that the Solicitor for the Department has never passed on the question.

We submit that the legislation is all inclusive, and that the regulation and supervision of packers, provided for therein, extends to every line of business engaged in by any coming within the definition of "Packer" contained in the Act. This is hereinafter discussed at page 73.

A further contention regarding an alleged waiver of rights in reliance upon the assumed perpetuity of the consent decree is based upon the proceedings before the Interstate Commerce Commission (*National Whol. Groc. Ass'n. et al. v. Director General, et al.*, and *Southern Wholesale Grocers Ass'n. v. Director General, et al.*, 62 I. C. C. 375) instituted by the interveners against certain common carriers. This proceeding was instituted to prevent carriers from permitting meat packers to ship grocery articles in their peddler cars. The complaints filed related to all meat packers but that fact did not deter counsel for the American Association from stating at page 8 of their brief that the charges related to "The Big Five Packers". The American Association claims (Brief p. 8) that it abandoned the prosecution of this proceeding before the Commission because the appellees herein contended that the consent decree had removed any competitive relation between them and the grocers.

However, the decision of the Interstate Commerce Com-

merce Commission will show, (page 381) that the National Association vigorously prosecuted the case through to a conclusion; that the American Association, after hearings, moved to place its complaint on the suspense docket which motion was denied by the Commission; that while thereafter the American Association did not actively participate in the proceedings, such course was wholly voluntary, and with full knowledge that the case would be carried through to a decision by the Commission, and with equally full knowledge that the case was being carried forward by their co-appellant here, the National Association. Therefore the American Association has no ground for complaint in this respect.

The wholesale grocers regard the decree of February 27, 1920, from the selfish viewpoint of their own business and have in mind the increased competition resulting from appellees engaging in that business. The wholesale grocers associations constitute a part of the public but do not represent the public interest as a whole. They represent themselves and no one else. Upon no possible theory can the wholesale grocers maintain that their private interests and only such interests shall be considered in determining whether the decree of 1920 shall or shall not be modified.

The interveners had an opportunity to call as witnesses members of their organizations to testify as to the manner and extent, if any, to which their business would be injured by modification. The interveners did not elect to avail themselves of that privilege though the court granted them intervention so that they might be heard and for no other purpose. We respectfully submit that the wholesale grocers as limited interveners have no right to assume control of this proceeding contrary to the position taken by the Government.

PART II: THE PROOF OF CHANGED CONDITIONS.

IV. Changed Conditions Have Removed Any Danger of Monopolistic Control by the Defendants.

Government counsel state at page 29 of their brief that we can not urge that the relief granted in 1920 was inappropriate or unnecessary. We do not make such contention but we do urge that under present conditions the further continuance of certain of the provisions of the decree is neither appropriate nor necessary.

In order to show that there have occurred changes in the conditions which in 1920 were regarded as creating danger of monopolistic control, we must first ascertain what those conditions were. There are two sources from which this information can properly be obtained, namely, the petition of 1920 and evidence in the record regarding conditions in the meat packing and food industry in 1920. The allegations of the petition of 1920 were denied by all defendants and the decree was entered with the distinct understanding that it should not constitute an adjudication of any violation of law, but nevertheless the Government's viewpoint in 1920 can be ascertained from the petition. The petition definitely and comprehensively tells us why the Government was apprehensive of monopoly in 1920. The information thus obtained can be supplemented by the facts proved as to conditions which existed in the meat packing and food industry in 1920. By comparing the information thus obtained with present-day conditions in the meat packing and food industry, we believe we can demonstrate to a certainty that radical changes have occurred during the last ten years which remove all basis for fear of future monopoly by the defendants.

A. FINANCIAL LOSSES OF THE DEFENDANT PACKERS IN 1920, 1921 AND 1922.

In the year 1921, Swift & Company sustained operating losses of $7,812,000 (R. 888a). Armour and Company

sustained operating losses of $31,710,000 in 1921 and $7,679,000 in 1922 (R. 937). Morris & Company lost $2,955,000 in 1920, $11,448,000 in 1921 and $2,546,000 in 1922 (R. 937). Wilson & Company lost $2,941,000 in 1920, $8,462,000 in 1921, and $2,243,000 in 1922, and these losses of Wilson & Company were computed before providing for depreciation of properties (R. 888a). Cudahy Packing Company lost $1,570,000 in 1921 (R. 888a). The total operating losses sustained by the five defendant packers in 1921 were $61,002,000 (R. 888a).

The object of a monopoly is pecuniary. The enormous losses sustained by the defendant packers subsequent to the entry of the decree clearly proved an entire lack of ability to control prices of either livestock or meats.

B. THE RESULT OF THE LOSSES OF 1920, 1921 AND 1922—MORRIS & COMPANY, SOLD; ARMOUR AND COMPANY, REFINANCED; AND WILSON & COMPANY, BANKRUPT.

The losses of Morris & Company in 1920, 1921 and 1922 aggregated $16,949,000, which was about one-third of its entire capital and surplus (R. 937). On March 24, 1923, it sold its physical properties and business to Armour and Company and discontinued business (R. 964). Armour and Company purchased Morris & Company because the Armour plant capacity was greatly developed during the war period and as a result of shrinkage of business after the war, its plants were being operated at about 50 per cent capacity. It was totally impossible to obtain the required amount of volume by solicitation in the competitive field and the only solution of Armour and Company's difficulty was to buy the business of a competitor. The object of the purchase was to reduce the cost of doing business (R. 613) and the opinion of the Secretary of Agriculture, hereinafter discussed at page 79, upholding the validity of the purchase, states that the evidence considered by him was persuasive to the effect that the purchase was made for the purpose of effecting economies in the

Armour and Company business by increasing sales and reducing overhead. (R. 966)

The losses of Armour and Company in 1921 and 1922 aggregating $39,339,000 (R. 937) necessitated a refinancing of the company. A subsidiary, Armour and Company of Delaware, was organized, and issued and sold to the public $50,000,000 of first mortgage bonds and $60,000,000 of preferred stock, all of which was guaranteed by the parent company (Petitioner's Exhibit 126*). A finance committee consisting principally of bankers, appears on the Armour and Company annual report for December 31, 1922 (Petitioners' Exhibit 126) and instead of a corporation controlled in 1920 by the members of the Armour family (R. 544), we find in 1929 a corporation not so controlled, but having 26,000 common stockholders and 54,000 preferred stockholders (R. 543).

As a result of this refinancing, the preferred stock dividend requirements of Armour and Company at the present time are $9,400,000 a year (R. 631) and in 1929 its net profit in a year of 53 weeks was $9,811,000 (R. 937). Armour and Company paid its preferred stock dividend from surplus in 1921, 1922 and 1927 (Petitioners' Exhibit 126), and failed to pay any dividends whatever on common stock in 1922, 1923, 1924, 1927, 1928 and 1929 (R. 940a).

In 1924 Wilson & Company found itself unable to renew its maturing bank loans and on August 26, 1924, a bill for receivership was filed against it and Wilson & Company filed an answer admitting the allegations of the bill as to its insolvency. Receivers were appointed and a few days later an involuntary petition in bankruptcy was filed against Wilson & Company and it was adjudicated a bankrupt. A reorganization followed and Wilson & Co., (Inc.), a new corporation, acquired at a judicial sale, the business and assets of Wilson & Company (R. 558-559).

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*This is one of the exhibits omitted from the printed record but filed with the Clerk of the Court with a stipulation that reference may be made to such exhibits in brief or argument (R. 1172).

We do not claim that the losses suffered by the defendant packers in 1920, 1921 and 1922, the sale of Morris & Company, and the bankruptcy of Wilson & Company were caused by the consent decree. We only claim that the losses were in fact sustained; that they were sustained subsequent to the entry of the decree, and that they substantially weakened the financial position of the defendant packers. Assuming threatened monopoly, justifying injunction, in 1920, clearly it was no longer threatened by those unable to operate profitably, to stay in business, or to avoid bankruptcy.

C. GROWTH OF BUSINESS COMPETITORS SINCE 1920 AND THE PRESENT POSITION OF THE DEFENDANT PACKERS IN THE INDUSTRY,—SWIFT 15.2%; ARMOUR 14.1%; CUDAHY 4.7%; AND WILSON 4.3%.

The United States Bureau of Census gathers statistics every two years with reference to manufacturing establishments whose production amounts to $5,000 a year or more. (R. 389)

The Census figures show not only an increase in the number of slaughtering and meat packing establishments in 1927* as compared with 1921, but also show that the increase occurred with respect to the larger establishments. The following table shows the 1921 and 1927 establishments classified according to value of production per year:

Production	1921	1927
$5,000 to $20,000	142	64
$20,000 to $100,000	304	267
$100,000 to $500,000	360	429
$500,000 to $1,000,000	112	163
$1,000,000 and over.	266	327
Total	1184	1250 (R. 391)

*The last year for which figures were available at the time of trial.

The Packers and Stockyards Administration of the Department of Agriculture receives annual reports from concerns engaged in the packing industry in interstate commerce. The figures of this Administration deal with concerns rather than establishments as is the case in the Census figures. (R. 411) The Packers and Stockyards Act was enacted August 15, 1921, (42 Stat. 159). In 1925, 514 separate meat packing concerns reported to the Administration and by 1929 the number had increased to 998. (R. 733)

In making a comparison of the defendant packers' volume of business with that of their competitors, we shall treat the four defendants *separately* and not as a group. There is no justification whatever for doing otherwise. The Government introduced exhibits (R. 1036a to 1038a) which use the term "Big Four" and treat the business of the four defendants as that of a single concern, and thus assume the absence of competition among them notwithstanding the fact that they are independently owned and controlled (R. 646, 613, 710, 681) and all parties stipulated and agreed that they are active competitors. (R. 558) The trial court so found (R. 1110), and error has not been assigned on this finding (R. 1118-25).

The appellants nevertheless contend that the position of the appellees in the packing industry should be measured upon the basis of their combined business, and that this combined business should be compared with total business of meat packers who slaughter livestock and are engaged in interstate commerce. On this unsound basis, it is claimed that the appellees, combined, control over 54 per cent, and that the four defendant packers control over 70 per cent, of the output of all packers engaged in interstate commerce. (Government's Br., p. 35) The figures used relate to the year 1929 and ignore the business of 245 interstate meat packing concerns subject to the Packers and Stockyards Act simply because they do not engage in slaughtering. (R. 1036h) The figures also ignore the business of 372

additional meat packing concerns who slaughter livestock bought in interstate commerce and are subject to the Packers and Stockyards Act but who do not ship meat products in interstate commerce (R. 1036h). These figures also ignore 166 additional meat packing concerns whose reports were not received by the Administration in time to be included in the 1929 figures (R. 1036h).

The omission of the business of the non-slaughtering packers is not justified. The Beech Nut Packing Company does not engage in slaughtering but its sales for 1929 amounted to $25,000,000 (R. 502-3). Frederick S. Snyder testified that his company does no slaughtering but buys dressed carcasses from about one hundred different midwestern packers. The company performs all of the functions of a packing house apart from slaughtering and its 1930 sales amounted to approximately $10,000,000 (R. 458). The competition of such concerns is not reflected by slaughter figures. The volume and profitable nature of the business of the non-slaughtering packers is proved by Government Exhibit 7 (R. 1036a), which shows that 245 non-slaughtering packers reporting to the Packers and Stockyards Administration in 1929 made sales of $447,229,982 upon which they earned a net profit of $25,835,501 as compared with the best showing of any of the defendants—a net profit of $13,076,000.15 earned by Swift & Company on sales of $1,035,263,000 (R. 953).

The percentage figures adopted by the Government completely ignore the competition of the intra-state packer. Three of the meat packer witnesses who testified in this cause operate purely intra-state packing plants and each of them testified that his company competes with each of the appellees (Henry Fischer, Louisville, R. 432-3; Abraham R. Goldberg, Birmingham, R. 430; and Sederin L. Frey, New Orleans, R. 439). Oscar G. Mayer, President of Oscar Mayer and Co., of Chicago testified that the most severe competition the interstate packer encounters is that of the non-inspected intrastate plant (R. 421). Thomas

W. Talliaferro, President of Hammond Standish & Company of Detroit, testified:

> "At the present time there are 27 uninspected killers in Detroit that slaughter cattle, calves, lambs and hogs. In 1920 there were only four. One of these uninspected slaughtering concerns at the present time kills more lambs than all the Federally inspected plants at Detroit put together." (R. 444)

The testimony in the record is conclusive that keen competition exists between interstate and intrastate meat packers and between slaughtering and non-slaughtering packers.

For many years the United States Department of Agriculture has published estimated figures showing the total slaughter of livestock in the United States. Petitioners' Exhibit 10 (R. 816a) was prepared by an economist of the Department of Agriculture and shows the slaughter of the defendant meat packers and their subsidiaries as compared with total United States slaughter as to each class of livestock. It also shows the estimated total number of pounds of meat and lard produced from the animals slaughtered. These tonnage figures were arrived at by reducing the animals to a dressed weight basis, and afford a better comparison than the number of head, which disregards the great discrepancies in weight of the different classes of livestock. This exhibit shows the following percentage relations between each of the defendant meat packers' production of meat and lard and the total production of meat and lard in the United States during the years 1920 and 1929:

	1920	1929
Swift	13.2%	15.2%
Armour (Including Morris)	15.8%	14.1%
Wilson	5.2%	4.3%
Cudahy	4.0%	4.7%

(R. 816a)

Two of the alleged monopolists of 1920 have been unable to retain the percentage of business they had in 1920. The 1929 figures certainly are not suggestive of any monopolistic control at the present time. So far as our investigation has disclosed, the Government has never contended in any reported decision that danger of a monopoly existed in any industry where the largest concern in that industry controlled but 15.2 per cent of the total business.

That it is proper to consider the total production of the country instead of only the business of packers whose products are shipped in interstate commerce is shown by the following cases in which total production figures were used:

Standard Oil Co. vs. United States, 283 U. S. 163;
Geddes vs. Anaconda Copper Mining Co., 254 U. S. 590;
United States vs. United States Steel Corporation, 223 Fed. 55, 134; affirmed, 251 U. S. 417.
Bigelow vs. Calumet and Hecla Co. et al., 167 Fed. (6th C. C. A.) 721.

When this basis of comparison is used, it is apparent that the defendants considered either separately, or as a group do not have control of the meat business of the country.

During the ten year period from 1920 to 1929 many of the defendants' competitors have increased their volume of business as is proved by their testimony. The record shows the following comparison of 1920 and 1929 dollar sales of competitors of the defendant-packers:

	1920	1929	Record
Eastside Packing Company	$3,500,000	$22,000,000	425
Adolf Gobel, Inc.	7,052,000	46,032,000	866a
Bath Packing Company	8,000,000	33,932,000	549
Brennan Packing Company	9,631,000	13,598,000	866a
Oscar Mayer & Co.	11,187,000	23,492,000	866a
John J. Felin and Company	11,446,000	13,887,000	866a
Cleveland Provision Co.	12,000,000	13,500,000	439
Beech-Nut Packing Company	12,050,000	23,732,000	866a
Geo. A. Hormel and Company	25,324,000	38,220,000	866a
John Morrell and Company	51,944,907	101,976,252	546
Jacob Dold Packing Company	56,512,175	55,558,597	550

The Alabama Packing Company of Birmingham started business subsequent to 1920 with a capital of $23,000 and by 1929 had an invested capital of $400,000 (R. 429). The American Packing and Provision Company of Ogden, Utah was organized in 1924. Its sales increased from $2,800,000 in 1925 to $3,850,000 in 1929 (R. 430). The sales of Hammond Standish Company of Detroit increased from $6,600,000 in 1922 to $12,500,000 in 1929 (R. 443). The sales of Fischer Packing Company of Louisville increased from $1,000,000 in 1923 to $2,250,000 in 1929 (R. 432). The business of L. E. Frey and Sons, New Orleans has been tripled since 1923 (R. 438). Neuhoff Packing Company of Nashville has doubled its business since 1920 (R. 452), and the same is true of the East Tennessee Packing Company at Knoxville (R. 433). Blayney-Murphy Company of Denver has substantially increased its business since 1924. (R. 454)

With one exception all defendants' competitors increased the volume of their business in the decade between 1920 and 1930, the single exception being Jacob Dold Packing Company whose business decreased 1¼ per cent. At the same time each and every defendant meat packer suffered a decrease in business (R. 888a). Counsel for the Government seek to minimize the effect of this growth by stating (brief page 32) that the total sales of 13 of these competitors amounted to only $407,476,000. However, the significance of the figures is found in the fact that the growth of these competitors was very substantial, whereas the defendant meat packers all suffered a decrease in business. (R. 888a) Indeed the ability of a small packer to increase its volume of business is more significant than a similar growth by a larger packer. The Government contends (brief, page 32) that the "defendants have retained their *dominating* size and power." This growth of competitors certainly is not an evidence of *dominance*. The petition of 1920 charged that the defendants had "eliminated competition in meat products" (R. 17), but subsequent events have

proved there is extensive and active competition in the sale of meat products and that small concerns have been able to prosper and increase their volume during a period when the defendant packers have lost business and suffered severe financial losses.

Obviously it is not true that either the power to monopolize or to crush competitors exists in those who have not been able to hold their own strength, and who occupy part of a field wherein flourish increasingly successful and strong competitors—competitors who testified, without exception, that they have no fear of defendants' competition. Herein is found evidence of conditions radically changed when compared with the conditions set forth in the Government's original petition of 1920.

D. THE EARNING POWER OF THE DEFENDANT PACKERS AND THEIR COMPETITORS SINCE 1920.

The record contains evidence of the sales and earnings of 15 of the appellees' largest competitors from 1920 to 1929 (R. 866a and b) and also shows the same information as to the defendant packers (R. 888a). This information shows that in each and every year since 1920 competitors have lost less in bad years and earned more in good years than the defendant packers. The following table groups the defendants' earnings and compares the same with the combined earnings of 15 competitors from 1920 to 1929:

Year	Percentage of Defendants' Earnings on Sales	Percentage of Competitors' Earnings on Sales	Percentage of Defendants' Earnings on Net Worth	Percentage of Competitors' Earnings on Net Worth
1920	.18	.76	.88	2.48
1921	3.05 (Loss)	.17 (Loss)	10.27 (Loss)	5.80 (Loss)
1922	.10	2.72	.35	10.87
1923	1.58	3.40	5.65	12.00
1924	1.77	3.39	6.46	13.28
1925	1.44	2.03	5.82	9.11
1926	1.35	2.65	5.03	12.24
1927	.63	2.07	2.49	9.83
1928	1.24	3.17	5.13	14.10
1929	1.06	2.68	4.55	14.02

(R. 866a and b and 888a)

In the year 1929 Swift & Company earned 1.26 per cent on sales; Armour and Company .98 per cent; Wilson .75 per cent and Cudahy .94 per cent (R. 888a). In the same year Beech-Nut Packing Company earned 11.39 per cent on sales; Morrell & Company 3.62 per cent on sales; Hormel & Company, 5.80 per cent on sales; Rath Packing Company 1.64 per cent on sales; Felin & Company 3.00 per cent; Brennan Packing Company 2.93 per cent; and Miller and Hart 2.54 per cent (R. 866a).

In 1929 Swift & Company earned 5.78 per cent on net worth, Armour and Company 3.54 per cent, Wilson 3.52 per cent and Cudahy Packing Company 6.26 per cent (R. 888a). In the same year Morrell and Company earned 17.98 per cent on net worth; Beech Nut Packing Company 17.50 per cent; Hormel and Company 32.50 per cent; Felin and Company 13.73 per cent; Brennan Packing Company 11.70 per cent; and Miller and Hart 9.06 per cent (R. 866a and b). The percentage earnings of the defendant packers on net worth compared with the percentage earnings on net worth by all meat packing companies reporting to the Packers and Stockyards Administration from 1925 to 1929 were as follows:

Year	Concerns Under P. & S. Administration	Swift	Armour	Wilson	Cudahy
1925	6.87	7.12	5.04	2.75	8.48
1926	5.96	7.13	3.41	5.01	10.70
1927	3.94	5.47	.19	.24	5.91
1928	7.14	6.63	4.09	3.54	6.44
1929	6.45	5.78	3.54	3.52	6.26

(R. 817 and 888a)

We respectfully direct the Court's attention to the trend shown by the above tabulation. In the years 1925, 1926 and 1927 the percentage earnings of Swift & Company and Cudahy Packing Company exceeded the percentage earnings of the industry as a whole; whereas the percentage earnings of Armour & Company and Wilson and Company were less than the earnings of the industry as a whole.

During the last two years—1928 and 1929—each of the four defendant packers earned less than the industry as a whole.

The Government has attempted to show that the contrary is true and in its exhibits 21-23 has adopted a peculiar selective process of making comparisons in order to obtain the desired result. These exhibits (R. 1038a) compare the net sales and net earnings of the defendant packers with the net sales and net earnings of Federally-inspected slaughtering packers reporting to the Packers and Stockyards Administration. There are excluded from the exhibits not only the sales and profits of non-slaughtering packers who report to the Administration, but also the sales and profits of slaughtering packers who are under the jurisdiction of the Administration, because they buy livestock on public markets, but nevertheless are not classed as Federally-inspected packers because they do not ship meats in interstate commerce.

The extent of these omissions is disclosed by Government Exhibit 7 (R. 1036a). It appears from that exhibit that in 1929 there were 245 non-slaughtering packers under the jurisdiction of the Packers and Stockyards Administration who derived a net profit of $25,835,501.34 from sales of $447,229,982.22 (R. 1036a). Government Exhibit 7 further shows that in 1929 there were 372 non-inspected slaughtering concerns under the jurisdiction of the Packers and Stockyards Act and that they derived a net profit of $4,709,686.19 from sales of $289,002,009.16 (R. 1036a). Supplying these omissions in Government Exhibit 21, the following result is obtained:

	Sales	Profits	Percentage of Profits to Sales
Defendant Meat Packers	$2,558,742,455.18	$27,945,776.75	1.09
Other packers under P. & S. Administration	1,736,606,228.04	37,795,855.25	2.17

The method of comparison adopted by the Government produced a curious result for the year 1927. Government Exhibit 22 (R. 1038a) relating to that year shows that the defendant packers' combined sales were 69.76 per cent of total sales, and that their profits were 103.27 per cent of total profits. This is occasioned by the fact that during that year, 187 Federally inspected slaughterers other than the defendant packers sustained a net loss of $515,716.20 upon sales of $961,192,225.88 (R. 1038a). The Government witness who prepared this exhibit explained that this loss did not mean that all of the 187 Federally inspected slaughtering concerns lost money during the year 1927. He said that 70 per cent of the total losses were sustained by 6 concerns and that 47 per cent of the total losses were sustained by 2 concerns and that many of these concerns earned substantial profits in 1927 (R. 736). Correcting the Government exhibit relating to the year 1927 by supplying the sales and earnings of non-slaughtering packers and slaughtering packers not operating under Federal inspection, the conclusion that the defendant packers earned 103.27 per cent of profits on 69.76 per cent of the total sales is changed as follows:

	Sales	Profits	Percentage of Profits to Sales
Defendant Packers	$2,351,936,899.96	$16,299,602.81	.69
Other packers under P. & S. Administration	1,516,059,355.50	21,996,705.62	1.45

The trial court very aptly summarizes the comparisons of earnings of defendant packers and their competitors as follows:

> "So that under any method of comparison it does appear that the net profits of the defendants are small as compared with that of their competitors. One usual concomitant of a monoply, vast profits in proportion to its business, does not exist on the part of any of

the defendants. And as further evidence of this it appears that the defendant, Wilson & Company, became a bankrupt in 1924, and had to be reorganized." (R. 1048-9.)

There appears at page 34 of the Government brief a unique idea as to the manner in which prices for commodities are established in a highly competitive industry. Counsel state:

> "The higher operating costs of local packers is graphically reflected in the fact that they sell their meats at from one cent to three cents a pound above the prices charged by defendants (R. 430, 433, 441, 442, 448, 453, 660)."

The first record reference given by the Government in support of this statement is to the testimony of Abraham R. Goldberg, President of the Alabama Packing Company, an uninspected plant located at Birmingham (R. 429). This witness said:

> "We buy our livestock and sell our products in the face of keen competition with Armour, Swift, Cudahy, Wilson, and other packing concerns, and to a certain extent have an advantage over them, because we kill locally and sell our stuff fresh. This brings from a half cent to a cent a pound more than meat of the larger packers shipped in from outside." (R. 430)

The witness did not say anything about his operating costs. Each and every witness cited by the Government in support of its statement testified that he was able to get more money for his products because killed locally and sold fresh instead of being killed at a distance and shipped in. No packer witness testified that he could get more for his products than the defendants because his operating costs were higher. As a matter of fact the operating costs of a small packer are not higher than those of a large packer. The fact that in 1929 Morrell and Co.

earned 3.62 per cent on sales (R. 867), Hormel and Co. 5.80 per cent on sales (R. 871), Miller and Hart 2.54 per cent on sales (R. 876), Felin and Co. 3.0 per cent on sales (R. 874), Brennan Packing Company 2.93 per cent on sales (R. 875), as compared with earnings of 1.26 per cent on sales by Swift & Company and .98 per cent by Armour and Company (R. 888a), is inconsistent with the claim that small packers have higher operating costs than large packers.

E. THE INCREASE OF COÖPERATIVE SELLING AND DIRECT MARKETING OF LIVE STOCK SINCE 1920.

The basic raw material of the packing industry is livestock, produced on 6,297,877 farms in the United States (Petitioners' Exhibit 67, not printed, R. 1173). The farmers of the United States dispose of their livestock by sales on the public markets through the agency of commission men or the recently-developed cooperative marketing and shipping associations. They also sell livestock directly to packers, either by means of shipments to private yards located adjacent to packing plants or by selling to packer-buyers on farms or at concentration points in the country. They also dispose of livestock by slaughtering for home consumption or to sell on nearby markets.

The purchase of livestock on public markets is accomplished by buyers in the employ of packers, order buyers who act as agents for packers not located at the particular market where purchases are made, traders and speculators who buy with a view of reselling at a profit, and producers who purchase stockers and feeders for further feeding and finishing (R. 398).

The public livestock markets of the United States are controlled and regulated by the Secretary of Agriculture under the Packers and Stockyards Act of 1921. The petition of 1920 alleged there were at that time 50

public markets in the United States (R. 15). There are at the present time 74 such public markets (R. 818-20), located in 31 different states and the District of Columbia (R. 818-20). 89,832,592 head of livestock were received at these public markets in 1929.

The various types of buying and selling agencies operating on public markets are defined and classified by the Packers and Stockyards Act as market dealers and market agencies, and are required to register with the Administration and to furnish bonds to secure the performance of their obligations. At the present time there are registered with the Administration 4,461 market dealers and agencies operating on the public markets. (R. 408)

Since 1920 there has occurred an unusual growth in the sales of livestock by cooperative associations. The records of the Federal Farm Board show that in 1920 there were three cooperative sales agencies operating at three public markets—Denver, Omaha and St. Joseph—and that their combined sales were 84,863 cattle, 536,380 hogs and 29,676 sheep (R. 403). The same records show 28 such cooperative associations in 1929 operating at 22 public markets with sales of 1,904,066 cattle, 8,054,186 hogs and 2,093,137 sheep (R. 403). The dollar volume of sales in livestock by these cooperative agencies increased from $37,419,935 in 1920 to $302,894,934 in 1929. (R. 403.)

Direct sales of livestock, like cooperative sales, have increased enormously since 1920. Many packers today own and operate private yards adjacent to their packing plants (R. 413). Direct buying of livestock is also carried on at concentration points in the country and on farms. John Morrell and Company, operating packing plants at Ottumwa, Iowa, and Sioux Falls, S. Dak., killed more than 2,000,000 head of livestock in 1929 and purchased practically all of it directly from producers at its private yards or in the country. (R. 546-47) The Rath Packing Company of Waterloo, Iowa, killed 980,000

hogs and 40,000 cattle in 1929 and purchased substantially all its livestock at its plant or in the country (R. 549). An economist in the employ of the Department of Agriculture estimated that 40 per cent of the hogs sold in the United States during 1929 were sold direct instead of on the public markets (R. 401).

Manifestly, between 1920 and 1930 public stockyard markets ceased to be instrumentalities through which monopoly could be achieved.

F. THE GROWTH AND DEVELOPMENT OF MARKET NEWS SERVICE SINCE 1920.

The petition upon which the consent decree is based enumerates market papers and journals as one of the facilities controlled by the defendant packers in 1920, which constituted a means by which monopoly could be achieved. The petition further alleges:

> "Control of these papers and journals furnishes a means whereby the flow of stock to the market may be increased or decreased to the benefit of the slaughterer.
>
> "It is, therefore, evident that control of the stockyards and of other facilities appertaining to the stockyards carries with it: * * *
>
> "(e) Peculiar and exclusive access to information concerning the receipts and sale of livestock, its disposition, and the dissemination of information to the producer." (R. 12)

The appellees' witness, C. A. Burmeister of the Bureau of Agricultural Economics gave an exhaustive description of the existing news reporting service relating to livestock markets and meat trade conditions and of the growth and development of this service since 1920. The Bureau of Agricultural Economics is a branch of the Department of Agriculture and its function is to collect and disseminate information regarding the production and marketing of livestock and other agricultural prod-

ucts (R. 392). Its main office is in Washington. On January 1, 1930, it had 2,403 employees, of which 1029 were located in Washington and 1374 scattered throughout the United States. The Bureau operates 10,579 miles of leased wires and employs 70 telegraph operators at 48 separate offices (R. 392).

The Bureau, through its numerous employees, collects information during all hours of the day at the various public livestock markets and circulates market news as rapidly as possible by all modern means. Information is obtained from railroads and other sources regarding probable receipts of livestock at particular markets and estimates are sent by telegraph to the 48 offices of the Bureau (R. 394). Information regarding trends and prices is also released by wire as soon as obtainable (R. 394-5). Each morning a report is sent out of estimated receipts for the following day so as to inform shippers of conditions in time to make changes in their plans and either defer shipping or ship to a different market if they so desire (R. 395). After the close of each day's market a detailed mimeographed report of conditions and prices is prepared by the Government and sent free of cost to anyone on the mailing list. During the fiscal year 1930 five million such reports were distributed. (R. 395)

The market news service of the Department of Agriculture has recently been extended to direct buying. On September 2, 1930, an office was opened at Des Moines, Iowa and reporters in the employ of the Government now cover 29 concentration points located in the state of Iowa and disseminate information thus obtained (R. 399).

The telephone is also used to convey information regarding livestock and at the Chicago market the Bureau of Agricultural Economics operates 10 trunk lines for the purpose of answering inquiries regarding receipts and prices. (R. 400.)

The first use of the radio as a market news facility occurred in December, 1920, and by 1921 experimental

work was being conducted by three stations. The number of stations increased to 65 in 1922; 85 in 1923; 92 in 1924; and 110 in 1929 (R. 395-6).) Ninety of these 110 stations now broadcast information regarding livestock receipts and prices (R. 396).

The Department of Agriculture also maintains an extensive market reporting service with respect to meats, the wholesale price of meats, the supplies of meats in storage and meat trade conditions generally (R. 396). It also circulates information of an analytical and interpretive nature. Trained economists employed by the Government analyze and interpret facts and predict probable developments and trends as to livestock and other agricultural commodities (R. 396).

Market news regarding livestock is disseminated not alone by the Government, but also by various press associations, such as the Associated Press, International News Service and the United News Service (R. 399). The Associated Press operates 225,000 miles of leased wires and issues telegraphic reports regarding 37 public livestock markets (R. 429).

In 1920, the Government believed, as shown by the allegations of the petition, that the ownership of market papers and journals gave to the defendant packers "peculiar and exclusive access to information concerning the receipts and sales of livestock." (R. 12.) At the trial of the cause, the appellees, the United States Government, and the interveners entered into the following stipulation:

> "As to public markets, it is further stipulated that producers of livestock and sellers of meat and meat products and other food products in the United States are now enabled to receive prompt, full, accurate, and unbiased reports of the demand for livestock, the prices prevailing, the character and kind of stock required, the receipts at and condition of the markets in which stock is sold and the markets in which meat and other food products are sold, together

with information respecting trade and market conditions. There does not exist control by the defendants, or any of them, of the media or channels through which this information is furnished, or any peculiar and exclusive access to information concerning the receipts and sale of live stock, its disposition, the dissemination of information to the producer, or the sales and market conditions relating to meats and other finished products of live stock or other foods." (R. 564)

Obviously, there can be no dispute that during the decade following the entry of the 1920 decree this element in the then feared monopoly disappeared.

G. THE FUNCTIONS OF ORDER BUYERS AND THE EFFECT OF PRESENT DAY MARKET NEWS SERVICE THEREON.

In order to appreciate the difficulties which would be encountered in an attempt to monopolize the buying of livestock under present conditions, it is essential to consider the present-day activities of order buyers. Order buyers purchase live stock as agents for packers. (R. 398) In 1929 there were 264 order buyers operating on the public livestock markets (R. 408). A single order buying firm in the United States, Kennett Murray Livestock Buying Organization, maintains buying establishments at 15 public markets and makes purchases on behalf of from 600 to 700 different packing concerns. In a normal year, its purchases of livestock approximate 5,000,000 hogs, 250,000 cattle and 250,000 sheep (R. 534).

The order buyers nearly always make purchases for packers whose plants are located at a distance from the market where purchases are made. At Chicago, there are 16 order buying firms who employ 40 buyers and make purchases regularly on the Chicago market for more than 300 outside packers (R. 534). At East St. Louis, there are 14 order buying firms with 41 buyers who make purchases for approximately 100 packers (R. 534) and 70 per cent of the hogs sold on this market are purchased by

order buyers and shipped to packers located at distant points (R. 536).

In 1929, the total receipts of hogs at all public markets was 43,564,383 and of this total 15,492,053 hogs were not slaughtered where purchased, but were shipped for slaughter at distant points (R. 824b).

The extensive purchases of livestock through order buyers and the producers' exclusive control of shipments, combine to prevent the manipulation or control of prices at the public markets of the United States. The livestock market is a national market and not a local market as a result of the present highly developed news dissemination service of the Department of Agriculture. Because of the prompt receipt of accurate and unbiased market news, the producers are enabled to exercise intelligent judgment as to when and where they should ship, and packers scattered throughout the United States and operating both at near and distant markets through order buyers, are enabled to pick the time and the market at which they can buy to the best advantage. News dissemination diverts shipments and increases purchases on temporarily low markets and increases shipments and diverts purchases at temporarily high markets. As a result, the low markets promptly advance and high markets promptly decline.

C. B. Heinemann, of the Kennett Murray Livestock Buying Organization, testified that if his firm has orders to fill at the Chicago market on a particular day and finds that the Omaha market has a lower price prevailing for the same class and grade of livestock, he advises his customer to shift his order to the Omaha market (R. 536-7). This switching of orders to temporarily low markets immediately stimulates buying and brings the market back to normal. (R. 536-7.) John A. Hawkinson, former President of the Allied Packers, Inc. (R. 659), testified that if one livestock market goes to a lower level than other live-

stock markets, the low market immediately becomes a target for increased buying and quickly adjusts itself. (R. 661) Oscar G. Mayer testified that the various markets of the United States compete with each other and that if any one of them falls below the general level, orders immediately come in from other packers, and it is brought back in line. (R. 422.)

These factors operating on all markets are an absolute protection against the monopolization of any particular market. Purchases of livestock at low prices at any particular market immediately result in a curtailment of shipments and also an influx of orders from packers scattered throughout the country. Even 100 per cent buying on a market does not carry with it ability to control prices under present conditions. This is illustrated by private stockyards. If a packer operating a private yard should attempt to pay producers less than prevailing market prices, shipments to the private yard would immediately cease. The public market is not only subject to this undoubted power of producers to divert shipments but also to the increased activity of order buyers on temporarily low markets.

Under present conditions the smallest packer is on an equality with the largest packer as to the purchase of livestock. The small packer acquires news of receipts and prevailing prices just as promptly as the large packers. The small packer can place an order at any market through the agency of an order buyer and can buy at the same price as the large packer. There is no such thing as a quantity discount in the livestock market because there are no quantity sellers. Livestock is owned by the 6,000,000 farmers of the United States and must of necessity be purchased in small quantities. The large packer does not make larger purchases than the small packer, but simply makes a larger number of small purchases from different owners. (R. 423)

The differences in conditions which confronted an at-

tempted monopolist of livestock buying in 1920 as compared with the present day facts is as striking an example of changed conditions as can be imagined. In 1920, a packer seeking a monopoly in the buying of livestock would have had to contend with 50 public markets (R. 15). Today, there are 74 such markets (R. 818-820). In 1920 the 50 markets were not regulated by any Government agency. Now, the 74 markets, and the 4,461 registered market agencies and dealers operating thereon, are thoroughly regulated and supervised by the Secretary of Agriculture. In 1920, direct selling and buying was insignificant, but today 40 per cent of the hogs killed are sold directly and never reach a public market (R. 401). In 1920, there was little or no cooperative selling, but today more than $300,000,000 of livestock is sold cooperatively in a single year (R. 403). In 1920, according to the allegations of the petition, the defendant packers had exclusive access to information as to livestock receipts and prices and could control the flow of livestock to markets, but today there are more than 2,400 Government employees engaged in collecting market information and circulating it by 10,000 miles of wires, 90 radio stations and 5,000,000 mimeographed bulletins a year (R. 392).

All of these factors combine to make impossible the control of livestock prices or monopolization of livestock markets. This was conclusively established by the testimony of livestock producers, commission men, order buyers, and competing packers at the hearing below: Moody (R. 405); Mayer (R. 420); Hunter (R. 426-7); Miller (R. 431); Fischer (R. 433); Madden (R. 434); Heil (R. 437); Frey (R. 439); Schanz (R. 440); Neuhoff (R. 452); Murphy (R. 455); Trier (R. 456); Magee (R. 478); Tomhave (R. 480); Walker (R. 481); Tod (R. 483); Gunn (R. 484); Hooper (R. 485); Mercer (R. 487); Wing (R. 488); Heinemann (R. 536).

Inevitable therefore was the fully supported finding of the District Court, as follows:

"4. That defendants in purchasing live stock from producers and their representatives are in keen and active competition with each other, and with many other buyers of live stock, and do not subject the sellers to any unfair trade practices and do treat them fairly; and that these fair and competitive conditions apply to purchases of live stock made by defendants (a) at public stockyard markets, (b) at their own private stockyards, and (c) when buying directly from the producer, or his agent, at or near places of production. (R. 1111)

H. THE REPORTS OF THE COURT'S TRUSTEES REGARDING STOCKYARDS.

It is true, as stated by appellants, that the lower court refused to modify that part of the consent decree which relates to the ownership of stockyard companies. Nevertheless the proof of changed conditions with reference to stockyards has a material bearing upon the modification of the decree which was granted. The lower court said in his opinion:

"I do not think that in order to show a right to modify the injunction in any one respect, the changes in conditions which would justify such a modification should be limited to those bearing particularly upon that one question, * * *.

The gravest source of danger alleged in the bill was that with reference to the control by the defendants of the stockyards, terminal railroads and market newspapers, and the most reprehensible practices charged against the packers were those connected with their operation of those facilities * * *". (R. 1057)

The allegations of the original petition disclose that in the view of the Government in 1920, the public stockyards owned by the defendant packers were a dangerous instrumentality of monopoly. (R. 9-12) The petition alleged that the stockyard "was and is in theory a public market place;" that yardage charges were ordinarily based upon "an arbitrary price per head" (R. 9); that

stockyard companies generally owned or controlled all available land within the public yards and could thus prevent the erection of new packing plants and hamper the growth of those in existence; that the ownership of stockyards carried with it a power to grant monopolies to banks, cattle loan institutions and rendering plants and also was a potential means of favoritism in connection with the allotment of office space and pens to commission men (R. 10-12).

Paragraph second of the decree of 1920 enjoined the defendants from owning any capital stock or other interest in any public stockyard company, or stockyard terminal railroad, o. stockyard newspaper or journal (R. 154). Paragraph tenth of the decree directed the defendants to submit to the court a plan for the divestiture of their existing ownership of interests in public stockyards, terminal railroads and market newspapers (R. 162-3). Pursuant to this requirement of the decree a plan for the disposition of such interests was approved by the court and Mr. George Sutherland and Mr. Henry W. Anderson were appointed Trustees. The Swift and Armour corporate and individual defendants deposited with the Illinois Trust & Savings Bank of Chicago, as depositary, their certificates of stock in stockyards companies and executed and delivered to said Trustees irrevocable powers of attorney authorizing the Trustees to vote said stock at stockholders' meetings (R. 977-8).

The Trustees, and a Special Assistant to the Attorney General, thereafter conducted hearings at all of the public stockyards in which either the Swift or Armour defendants had a substantial interest. Such hearings were public and a voluminous record of the testimony and a report thereon were filed by the Trustees with the court on April 8, 1922 (R. 977-999). A further report was made by Mr. Anderson as sole Trustee on March 21, 1923 (R. 999-1011).

The Trustees' Report of April 8, 1922, discloses numerous efforts made to sell the Swift and Armour interests in

stockyard companies. These efforts culminated with the insertion of advertisements in 28 different newspapers scattered throughout the United States offering the Swift and Armour stock in stockyard companies at public sale. No bids were received for any substantial part of the stock as a result of these advertisements (R. 996).

On the subject covered by the charges of the petition of 1920 to the effect that stockyard companies were utilized by the defendants to prevent the establishment of new packing plants, the Trustees, speaking of conditions found by them in 1922, reported to the Court as follows:

> "Your Trustees directed their inquiry at each yard to the question as to whether there was any discrimination by the stockyard companies against such independent plants, either in leasing land upon which to locate said plants or in any other manner. The testimony both of the officers of the stockyard companies and of the managers or owners of such independent plants was unanimously to the effect that no such discrimination existed and that the stockyard companies did everything in their power to encourage the location of plants at or near their yards, with a view to the development of their markets and resulting increase in their business." (R. 990.)

There is no scarcity of packing plants adjacent to public markets at the present time. There are 57 plants at Chicago, 36 at Cincinnati, 29 at Buffalo, 21 at San Francisco, 40 at New York, 34 at Philadelphia, 20 at Pittsburgh and 34 at Baltimore, etc. (R. 391). Furthermore, the growth of direct buying and selling since 1920 has minimized, if not removed the advantage of establishing packing plants adjacent to public markets. The tremendous growth of the business of such concerns as Morrell & Company at Ottumwa, Iowa (R. 546), George A. Hormel & Company at Austin, Minn., (R. 871) and Rath Packing Company at Waterloo, Iowa (R. 549), all far removed from any public stockyards, proves that a site adjacent to a public yard is no longer essential.

The petition of 1920 alleged that cattle raisers were in many instances dependent upon banks or loan companies to finance them in the rearing of livestock and that it was a great advantage to cattle loan companies to be located in or near the stockyards. The petition further charged:

> "It, therefore, lies within the power of the owner of the stockyard companies to designate how many and which banks or loan companies may establish themselves at the yards." (R. 10)

The Trustees' Report of April 8, 1922, contains the following statements regarding stockyard banks:

> "There is maintained and operated at the administration or exchange building at each of the stock yards visited, and as your trustees are advised at the other company yards also, a stock yard bank. This institution leases its quarters in the administration building from the stockyards company, but in no instance did the testimony show that the stockyards company was in any wise interested in the stock of the bank, or had any control over the operations thereof. * * * Your trustees could find nothing in the relations between these banks and the stockyard companies in violation of the anti-trust laws of the United States or of the decree in this cause." (R. 988-9)

The petition of 1920 contains the following allegations regarding rendering plants:

> "While in transit or after reaching the yards, live stock often die either from disease or accident. The stockyard companies, by virtue of their agreement with the commission men, are permitted to determine who shall buy the dead animals and the price which shall be paid therefor. This monopoly power has generally resulted in the establishment of only one dead rendering plant at each of the important yards." (R. 10-11)

On the subject of rendering plants the Trustees in 1922 made the following report:

"At each of the stockyards there is operated a rendering plant where dead animals and others not fit for marketing are converted into grease and other commercial products. Your trustees were advised that there had been some complaint of the limitation of this business to one company at each yard, and they directed their inquiries to this subject to find out if there was anything in this method of conduct of the business contrary to the law or to the decree of this court. The evidence showed that in no instance was the rendering plant controlled by the stockyard company, and in fact your trustee found no instance in which the stockyard company had any interest in the company operating the rendering plant. Your trustee found, however, that it was the practice in all of these yards to limit this business to one company. It was claimed that this course was necessary in order to insure efficient operation of this business and to give to the stockyard company some responsible agency to which it could look for the prompt removal of dead animals, which was essential to the sanitary condition of the yard. The reason given for this method of conducting this branch of the business seemed to your trustees to be substantial and adequate, and they found nothing in the dealings between the stockyard companies and the rendering plants which they deemed a violation of the anti-trust laws of the United States, or of the decree of this court." (R. 988).

The petition of 1920 makes the following charges regarding the allotment of pens and office space to commission men:

"The commission men and traders at the stock yards must have offices in or near the yards. They can get such accommodations only from renting or leasing from the stockyard companies. For the purpose of furnishing such office space each yard has a large building or series of buildings in which offices are leased to the commission men. The commission men are allotted pens, and inasmuch as it of great advantage to the commission men to be able to dispose

of his customers' live stock at the earliest possible hour, location of pens most favorable to the prospective buyer is of great advantage.". (R. 11)

The Trustees reported, as to 1922 conditions, on this subject as follows:

"Your trustees made special inquiry into the methods followed in assigning pens or space to the various commission men, traders and speculators who operated in the yards. This inquiry was especially directed to the question as to whether there was any discrimination in this regard. It appears that no charge is made by the stockyard company for the use of the pens by the commission men, traders and speculators. The pens are assigned to the various commission men in one section of the yard, to traders in another section and to speculators in another section, the object being to arrange these assignments in such way as best to promote the convenience and expeditious handling of the cattle in the yards, and to avoid movements in different directions. The amount of space assigned to each of the commission men, traders and speculators is based generally upon the amount of business done the preceding year. These assignments of space are readjusted from time to time to meet the changes in the development of the business of the various commission men, traders and speculators. If a new buyer enters the yard he is given the best available space, the amount thereof being based upon his probable business, and thereafter adjusted in accordance with experience. While each of the commission men, traders, and speculators naturally desire to secure the best location possible in the yard, we found no evidence of discrimination in the assignment of pens, and there was no testimony that this phase of the business was not handled with fairness * * *." (R. 985-6)

Regarding terminal railroads the petition of 1920 charged the following:

"The centralization of the market at one site and the resultant growth of the packing houses in or about the market, of necessity, required terminal railways to facilitate the switching of cars from the railroads to the stock yards, from the yards to the packing plants, and from the packing plants to the railroads. These terminal or stock yard railways are usually owned by the stock yard companies or by those in control of the stock yard companies. Control of these railways carries with it power to grant or withhold sidings, spurs, or other accommodations which may be required by the packing house, and those in control of said terminal railways are thereby in a position to discriminate against other packers or independent buyers by practicing delay in loading the animals bought by said packers or independent buyers and in switching the loaded cars to the connecting lines." (R. 11)

Regarding terminal railroads in 1922 the Trustees reported as follows:

"These terminal railroads are under the supervision of the Interstate Commerce Commission and of the state public utility commissions within the limits of their jurisdiction. Their rates are on file with the Interstate Commerce Commission." (R. 985)

The Trustees of the Court reported at length regarding the efficiency with which packer-owned yards were operated and managed and said that such management was entirely lawful and that the witnesses called were unable to suggest any improvement in management (R. 992-3).

And in conclusion the Trustees reported:

"Your trustees having thus acquainted themselves with the conduct and operation of said stockyard companies and stockyard terminal railroads both by personal inspection and through the evidence of representatives of every class of persons interested in the conduct of business upon said yards to the extent and in the manner aforesaid, have reached the conclusion

that said stockyards and stockyard terminal railroads are not now being used in violation of the Anti-Trust Laws of the United States, or of the decree of this court entered in this cause." (R. 993.)

In the supplemental report of March 21, 1923, Mr. Anderson further advised the Court:

"The evidence was universal to the effect that the stock yards company had nothing to do with the sale or handling of live stock on the yards, except to provide the facilities and service, and your trustee was unable to develop any evidence of the slightest discrimination on the part of stock yards companies as between packers and other buyers. The testimony was also general that there was full and free competition in the purchase of live stock upon the yards at all points visited." (R. 1010)

The extensive investigation made by the Court's Trustees with reference to stockyards and stockyard facilities was made subsequent to the entry of the decree of 1920. The reports of the Trustees appear in full at pages 977-1011 of the record and they establish definitely that the charges made by the petition with reference to stockyards in 1920 were not true when the subject matter was investigated by the Trustees in 1922 and 1923.

I. THE PACKERS AND STOCKYARDS ACT OF AUGUST 15, 1921 AND THE ADMINISTRATION THEREOF.

(1) THE SCOPE OF THE ACT.

The Packers and Stockyards Act was enacted by Congress August 15, 1921. (42 Stat. 159) It confers on the Secretary of Agriculture complete supervisory and regulatory power over packers and stockyards.

The Government contends:

"Furthermore, the Act does not apply to unrelated lines. The Act confers no jurisdiction, and the Secretary has never attempted to exercise any jurisdiction,

over packer use of refrigerator cars or over business done by packers in unrelated lines." (Government Brief 63.)

The trouble with this inference is that the Act *does* deal with the handling of unrelated food lines by packers as well as all other activities of packers.

Title II of the Act relates to "Packers". In Section 201, the term "packer" is defined as:

> "any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, * * * "

Section 202 declares it to be unlawful for:

> "any packer to (a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or * * * (d) sell or * * * buy * * * from or for any other person, any article for the purpose * * * of manipulating or controlling prices in Commerce, or of creating a monopoly in * * * dealing in any article in Commerce * * *."

Section 2 (a) (6) declares that:

> "the term 'commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; * * *,"

and subdivision (b) relating to the "current of commerce" is expressly declared as

> "not in anywise limiting the foregoing definition * * *."

The comprehensive terms "any unfair practice," and "any article" are used. It is therefore perfectly obvious that the Act prohibits packers from engaging in any and all unfair practices or dealing in any article for the purpose

of controlling prices or creating a monopoly in interstate commerce. Congress clearly intended by this Act to transfer all of the jurisdiction of the Federal Trade Commission relating to packers to the Secretary of Agriculture. It certainly did not intend to place the packers under a divided jurisdiction, and so in Sec. 406 (b) it enacted that:

> "the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this act is made subject to the jurisdiction of the Secretary, * * *."

If Congress had intended otherwise, it would have reserved to the Federal Trade Commission, such jurisdiction as it desired retained by that Commission, just as, in Sec. 406 (a) it reserved certain jurisdiction to the Interstate Commerce Commission.

This construction of the statute is confirmed, its constitutionality upheld and its general purpose described in *Stafford vs. Wallace,* 258 U. S. 495, where at page 513 it is said:

> "The Packers and Stockyards Act of 1921 seeks to regulate the business of the packers done in interstate commerce, and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice."

The Secretary of Agriculture so construed the statute in holding that he had jurisdiction over activities of packers in the ownership and operation of private stockyards which are not subject to the Act. Dr. Frank W. Miller, Assistant Chief, Packers and Stockyards Ad-

ministration, Bureau of Animal Industry, Department of Agriculture, testified:

> "We claim jurisdiction over private yards and concentration points operated by packing concerns * * * only so far as what goes on in those yards comes under Title II of the Act, that is, so far as they are the operations of a packer as such (R. 413) * * *. We have had no cause involving the regulation of the business of dealing in canned fruits or vegetables by packers, and I do not know personally whether we have jurisdiction or not. * * * The Secretary of Agriculture held in Docket No. 1, that he had jurisdiction over the activities of the Fowler Packing Company, a subsidiary of Armour and Company, at the Mistletoe Yard, under Title II of the Act, and the Secretary exercised such jurisdiction." (R. 414)

If any aid to the interpretation of the statute is required it is found in the following statement of Mr. Haugen, who had the bill in charge as the Chairman of the House Committee on Agriculture,

> "It [the conference committee] therefore amended the Haugen Bill in such a manner as to relieve from regulation these outside industries only when having no affiliation with a packer, by subjecting the packer to complete regulation *no matter what line of business he goes into.*" (Congressional Record, August 9, 1921, Vol. 61, Pt. 5, p. 4781.)

The Packers and Stock Yards Act applies not only to the defendant packers but to all packers engaged in interstate commerce. It is therefore illogical to contend that the statute was not intended to apply to the transactions of packers in the handling of unrelated lines, merely because four out of several hundred packers had been prohibited from selling those articles by an injunctive decree. Whenever the occasion arises the Secretary will un-

doubtedly hold that by reason of his jurisdiction over packers he has jurisdiction over their activities in handling and dealing in the so-called unrelated lines. The Act is complete in itself and provides for full and complete supervision and regulation of all practices of the packers in interstate commerce whether relating to the meat business, unrelated lines or otherwise.

(2) THE ADMINISTRATION OF THE ACT.

Counsel for the Government contend that the prohibitions against unlawful conduct found in the Packers and Stockyards Act are contained in either the Sherman Act, the Clayton Act or the Federal Trade Commission Act, so that no change in conditions has resulted. Counsel ignore, however, the present regulation and supervision of packers and of stockyards by the Secretary of Agriculture. At the present time the Packers and Stockyards Administration with a large force of officials, accountants, engineers, livestock market supervisors, operating all over the country, maintaining offices at the principal markets, keeping daily contact with all market activities and transactions, represents a vitally new element in Governmental control (R. 407). The books and records of stockyard concerns under the jurisdiction of the Secretary are subject to examination. Scales are periodically inspected and tested by experts (R. 407). The organization of the Administration at Washington consists of the Chief of the Division and his assistants, including four separate sections in charge of trade practice matters, audits and accounts, rates and registration and personnel (R. 407).

All buyers employed by packers to buy livestock at public markets are required to register as dealers. The assistant chief of the Packers and Stockyards Administration described the present-day regulation of such buyers as follows:

"The packer buyer, of course, is subject to the same supervision, observation and practically daily contact by the Bureau's supervisor on the various stockyards, as are all other classes of buyers and registrants engaged in business at the market. If there are any complaints regarding their methods of buying, regarding competition, regarding unfair tactics brought to the attention of the supervisor by the sellers on the market or by any producer or shipper, the action of these buyers is promptly investigated and all the facts obtained that can be obtained and reports made to the Bureau." (R. 409-10)

Upon a wealth of undisputed evidence the District Court made its 18th Finding of Fact in this proceeding, as follows:

"18. That the administration of the Packers and Stockyards Act, 1921, by the Secretary of Agriculture, and the division of his Department set up by him therefor, subjects the defendant packers, in common with all other packers subject to the act, to complete supervision of their activities upon public stockyard markets and constitutes a real change in the conditions which existed at the time of the entry of the Decree of February 27, 1920, which change necessarily would greatly limit the power of the defendants to acquire a monopoly." (R. 1113)

The stockyards' rates and charges, which are regulated by the Secretary of Agriculture, include the so-called yardage services, within which are embraced the allotment of pen space, the selling of feed, the use of scales, the furnishing of water and all the various miscellaneous services which stockyard companies usually perform (R. 412).

The law requires that schedules of stockyard rates and charges be filed with the Secretary of Agriculture and published and this is done as a matter of actual practice. Changes in rates and charges can not be made without notice to the Secretary and he may, either on complaint or

on his own motion, conduct an inquiry with reference thereto. He has power to suspend new rates and charges, to conduct hearings with reference thereto, and to fix the charges which may be made (R. 412). His power to establish rates and charges was upheld by this Court in *Tagg Bros. & Moorehead v. United States*, 280 U. S. 420.

Because of the enactment of the Packers and Stockyards Act and the administration thereof, yardage charges are no longer arbitrary as was charged in the petition of 1920 (R. 9). Charges for feed and other services cannot now be fixed by the stockyard companies (R. 10). All charges of every kind made by a stockyard company are now regulated and established by a Department of the Government. The stockyards are no longer a "potential means of favoritism in dealing with commission men and of influence over them" as the Government alleged in 1920 (R. 12). They no longer constitute a power to grant monopolies or a means to prevent the establishment of new packing plants or to hamper the growth of those in existence, as was charged in 1920 (R. 12). The conduct and operation of stockyards, whether owned by packers or others, is subject to the constant and daily observation and supervision of the Department of Agriculture. Under present conditions, a packer derives no advantage whatever from the ownership of a public stockyard except the profit that may be earned on investment and that profit is limited and regulated in the same manner as the profit of public utilities. The possibility that any stockyard company might be used to promote a monopoly in the buying of livestock has completely disappeared as a result of events subsequent to the decree.

J. THE ARMOUR-MORRIS PROCEEDING.

On March 24, 1923 Armour and Company bought the business and physical properties of Morris and Company. (R. 964) The Secretary of Agriculture, acting under the Packers and Stockyards Act of 1921, filed a notice and

complaint against Armour and Company charging that the purchase of Morris and Company would have the tendency or effect of restraining interstate commerce and of creating a monopoly in the purchase of livestock and in the sale of meat and other livestock products, contrary to the provisions of the Packers and Stockyards Act. Armour and Company filed an answer to this notice and complaint and hearings were held commencing on April 30, 1923 and continuing to October 31, 1924, and a record was made consisting of 12,265 pages of testimony and several hundred exhibits (R. 961-965). On September 14, 1925 the Secretary of Agriculture, rendered his decision and dismissed the proceedings because the charges made by the notice and complaint were not sustained by the evidence. In the conclusion and order of September 14, 1925 by which the proceeding was dismissed, the Secretary of Agriculture said:

> "The undisputed evidence shows that competition on the whole in the sale of meats and meat food products in interstate commerce has not been diminished. (R. 967.) * * * Much evidence was introduced both by the Government and the respondents as to the effect of competition before and since the acquisition. The overwhelming weight of testimony is in favor of the view that competition has not been materially lessened by reason thereof, either in the buying of livestock or the sale of the meat or meat products thereof. Scores of independent packers were called by the respondents and they all testified that in the handling and sale of meat and meat food products competition has been keen and active. Many large retail dealers scattered throughout the country were placed on the stand by the respondents and they testified that competition was keen and active and that no unfair practices or coercive methods had been engaged in by Armour and Company." (R. 968)

The highly competitive nature of the packing industry was thus convincingly established as existing subsequent

to the date of the entry of the 1920 decree, The facts proved in the Armour-Morris proceeding were such that the Secretary of Agriculture, in a proceeding instituted by himself, was enabled to say that the overwhelming weight of evidence established that competition was not materially lessened by the acquisition of the third largest meat packer by the second largest meat packer in the United States.

K. THE RECORD CONTAINS NOT ONLY PROOF, BUT AN ADMISSION BY ALL PARTIES, THAT THERE IS NO MONOPOLY IN THE MEAT PACKING INDUSTRY AT THE PRESENT TIME.

"It is conceded that there is today no monopoly in the meat packing industry". (Opinion of District Court, R. 1043).

When the Government filed its petition in 1920 it alleged that the defendant packers had acquired a monopoly in the meat packing industry and that they were about to extend such monopoly to other foods. The same Government which alleged in the petition of February 27, 1920 that the defendants had "eliminated competition in the meat products" (R. 17), entered into a stipulation during the trial of this cause that all meat packers in the United States

> "* * * owned and controlled independently of each other are in active competition with each other in the purchase of livestock and in the sales of their products in the various geographical localities and districts within the United States in which they respectively purchase and sell." (R. 558)

The record shows without dispute that Swift, Armour, Wilson and Cudahy are "owned and controlled independently of each other" (R. 646, 613, 710, and 681), and the trial court found:

> "1. That defendants Swift & Company and its subsidiaries, Armour and Company and its subsidiaries, Cudahy Packing Company and its subsidiaries and

Wilson & Company and its subsidiaries, considered as four entities, are each owned and controlled independently of each other'' (R. 1110).

Error has not been assigned by any party to this finding (R. 1118-25). Therefore, all parties to this cause have admitted that active competition exists among the defendants as well as among all the 998 packers registered under the Packers and Stockyards Act (R. 411, 558) and all intrastate packers shown by the record.

This stipulation was not entered into until after the appellees had called as witnesses numerous competitors, who testified without exception to the fact which the Government and the interveners subsequently admitted. (Frederick S. Snyder, Batchelder Snyder Door & Doe Co., Boston, R. 457; Abraham R. Goldberg, Alabama Packing Company, Birmingham, R. 429; Andrew P. Miller, American Packing and Provision Company, Ogden, Utah, R. 430; Henry Fischer, Henry Fischer Packing Company, Louisville, Ky., R. 432; David G. Madden, East Tennessee Packing Company, Nashville, R. 433; Geo. L. Heil, Heil Packing Company, St. Louis, R. 437; Sederin L. Frey, L. E. Frey & Sons, New Orleans, R. 438; Henry A. Schanz, Cleveland Provisions Company, Cleveland, R. 439; Thos. W. Talliaferro, Hammond Standish & Company, Detroit, R. 442; Henry G. Neuhoff, Neuhoff Packing Co., Nashville, Tenn., R. 451; Jos. P. Murphy, Blayney-Murphy Company, Denver, R. 454; Paul W. Trier, Arnold Bros., Chicago, R. 456; Frank A. Hunter, East Side Packing Company, St. Louis, R. 425; Oscar G. Mayer, Oscar Mayer & Company, Chicago, R. 419.)*

*There appears in the record by stipulation the testimony of 18 additional competitors regarding the active competition existing in the meat packing industry: T. Henry Foster, R. 548; John W. Rath, R. 549; Wm. E. Price, R. 550; Frank M. Firor, R. 553; Bernard J. Brennan, R. 554; B. C. Dickinson, R. 554; Hiram R. Elliott, R. 554; Morton Fox, R. 555; George L. Franklin, R. 555; Jos. A. Gallagher, R. 555; Max Hahn, R. 555; Jay C. Hormel, R. 556; Myron McMillan, R. 556; Augustus Miller, R. 557; J. C. Payton, R. 557; A. J. Riester, R. 557; Homer H. Smith, R. 558; and Frank J. Sullivan, R. 558; and also the testimony of 83 live stock producers that they encounter keen and active competition for the purchase of their live stock (R. 559-64).

The Government did not produce, and presumably could not have produced, a single competitor of appellees to testify to lack of competition in either buying or selling at any place in the United States, or that a monopoly exists or might be acquired in the meat packing industry. Neither did the wholesale grocers, who profess intense interest in this case, produce any such witness, despite the fact that there are 6,000 wholesale grocers in the United States. The assumption that they were unable to produce any such witnesses is justified (*United States v. United States Steel Corporation*, 251 U. S. 417). An announcement of the Attorney General was read at the beginning of the hearing to the effect that it was his intention to present to the court every justifiable argument and fact tending to show that the decree should not be modified (R. 388). Had the Government or the interveners been able to locate one meat packer in the United States to testify that there was a lack of competition, or an actual or threatened monopoly, it is fair to assume that the witness would have been called.

In spite of the admission that no monopoly exists in the packing industry, Government counsel maintain that the defendant meat packers have a dominating power. They quote (Brief, p. 37) the testimony of the President of The Great Atlantic and Pacific Tea Company to support a claim that large chain store organizations are dependent upon the defendant packers for their meat supplies. This Government witness testified that in the eastern division his company bought "about 90 per cent" of its meats from "the big four" and that the loss of these channels would cause his company tremendous embarrassment. There is no necessity to indulge in generalities as to about how much of the Atlantic & Pacific's meat business is enjoyed by the so-called "big four." The Government introduced in evidence exact and authentic information on this subject (R. 496), in the form of a letter dated October 13, 1930, from the National Fresh Meat

Representative of The Great Atlantic and Pacific Tea Company to Mr. Teegarden, Special Assistant to the Attorney General, reading in part:

> "From the figures available, the products handled in our Meat Department by the various packers would be divided approximately as follows:

Swift and subsidiaries	14%	of our business
Armour and subsidiaries	12%	
Wilson and Cudahy	8½%	
The Other Independents	65½%	
Total	100%	

> "In reference to your last paragraph, it would be quite impossible for us to furnish you with a complete list of the Independent packers. We estimate very conservatively that in our fifty units we are doing business with at least three hundred Independent and local slaughterers and sausage makers. The New England Division alone last month did business with over fifty-five local concerns." (R. 1029).

In support of the contention that the appellees have a dominating position, the Government states that Swift and Armour each control over 50 subsidiary corporations (Brief, p. 33), and a list of such corporations is set forth in an appendix to the Government brief (Brief, pp. 76-79). The fact that the appellees carry on business in every State of the Union and in foreign countries, indicates the necessity for subsidiary corporations. The number of subsidiary corporations is not a test of power, but if so, we can find greater power in National Dairy Products Company, which has 73 subsidiary corporations (R. 839-840), and in the Borden Company, which has 124 subsidiary corporations (R. 846). Furthermore, the petition of 1920 charged that at that time the defendants had control of or an interest in 762 different corporations (R. 18).

Repeatedly appellants stress the size of appellees and their business, for the obvious purpose of suggesting that for this reason they should remain under the 1920 injunction unmodified. A complete answer to this contention is found in this Court's decision in *United States vs. United States Steel Corporation,* 251 U. S. 417, 451:

> "But we must adhere to the law, and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them."

The trial court made the following findings of fact as to the absence of monopoly, and the existence of competition in the packing industry:

> "5. That defendants in the sale of their products are in keen and active competition with each other and with numerous others selling similar products and their competitive practices in the sale of their products are fair and lawful.
>
> "6. That in the transaction of their business defendants' treatment of customers is fair and lawful.
>
> "7. That none of the defendants has a monopoly in the meat packing industry.
>
> "8. That neither the four defendants, nor any two of them, are combined to monopolize or to attempt to monopolize the meat packing industry." (R. 1111)

The threatened monopoly of the *meat-foods* industry no longer exists; changed conditions have rendered it impossible. With its disappearance there went that which it was feared would grow from it and feed upon it, viz.: monopoly of *non-meat-foods.* Such a thing is now unthinkable. No injunction can possibly be thought necessary to prevent it. Such an injunction can only be destructive of competition, detrimental to the public, and unjust to the enjoined.

Counsel claim, however, that the present highly com-

petitive condition of the packing industry was brought about by the consent decree. Government counsel state at page 65 of their brief:

> "If no monopoly in the meat business exists today and if unlawful practices have been discontinued, the presumption is that this is due to the restraints imposed by the decree. We submit that the effectiveness of the decree cannot be urged as a ground for gradually whittling it away."

We shall not pause to discuss the fact that Government counsel who say at page 65 of their brief that the decree has been effective, say at page 11 of their brief that the decree has been avoided, and shall proceed to reply to the argument that the decree has been so effective that it is responsible for the present highly competitive condition of the packing industry and therefore should not be modified. The first paragraph of the consent decree is nothing more than a substantial repetition of the language contained in sections 1 and 2 of the Sherman Anti-Trust Act (R. 154). The sixth paragraph of the decree of 1920 restrains the defendants from operating retail markets (R. 161) but none of them had ever been engaged in the business of selling meats at retail, and it is difficult to appreciate how a prohibition against engaging in a business never carried on by them could be responsible for the present highly competitive conditions. Paragraph ninth of the decree enjoins the defendants from carrying on, or using, "any illegal trade practices of any nature whatsoever" (R. 162), but this language is not nearly as comprehensive as the prohibitions of the Packers and Stockyards Act of 1921 (42 Stat. 161). The decree of 1920 also directs the defendant packers to dispose of their interests in public stockyard market companies, stock yard terminal railroads and market newspapers (R. 154, 162-3) and it may be contended that this mandatory provision has been responsible for the competitive condition now exist-

ing in the packing industry. However, after the entry of the decree it appeared that the appellees' interest in stockyard companies were not salable. Repeated efforts to sell culminated in advertisements for bids in 28 newspapers with the lack of success reported by the Court's Trustees (R. 996). Furthermore the decree was suspended from May 1, 1925, to July 24, 1929 (R. 194-95). Therefore, that portion of the decree directing the sale of stockyard interests certainly cannot be credited with the present absence of monopoly.

We believe we have demonstrated the invalidity of the Government's contention that the absence of monopoly in the packing industry is due to the existence of the consent decree, but even if the contrary were true, and certain of the restrictive provisions of the decree have become unnecessary, because of the effectiveness of other provisions, then the former may properly and legally be modified or rescinded. If changed conditions remove the danger of monopoly it is immaterial whether brought about by the decree, economic conditions, or otherwise. The important question is whether danger of monopoly has been removed, and if so, the fact that the removal was due to other provisions of the decree which are to remain in effect would not be a ground for the reversal of the amendatory decree of January 31, 1931. No modification of any portion of the decree which relates to the meat packing industry is here involved. We are relieved only from that portion of the decree which prohibited the appellees from dealing at wholesale in the commodities enumerated in the fourth and fifth paragraphs of the decree. Such a modification of the consent decree does not give the appellees any advantage over their competitors, but simply places them on a basis of equality with their competitors who are now free to deal in commodities which under the unmodified decree could not be sold by the appellees.

It is true that by permitting the appellees to engage in the general food business, competition in that industry

is increased, but an increase in competition is desirable and will benefit rather than injure the public at large. Dr. Paul H. Nystrom, Professor of Marketing at Columbia University (R. 690) testified:

> "It is a fact that the addition of larger or more competitive factors necessarily makes for either lower prices or improved service. This is almost an inevitable result of increased competition." (R. 695)

The lower court has modified the decree so as to restore and increase competition in the food industry. The restriction in such competition imposed by the decree of 1920 is contrary to the spirit and purpose of our Anti-Trust laws and could only be justified in 1920 by the then existing threat of monopoly alleged in the Government's original petition. That threat no longer exists. It has vanished so completely that for the first time in history the Government has admitted of record that there is no monopoly in meat packing, and that there is full competition among defendants and all others in the industry.

I. CHANGED CONDITIONS IN THE FOOD INDUSTRY.

(1) THE MAGNITUDE OF THE FOOD INDUSTRY.

The United States Government census of manufactures for 1927 shows that in that year there were in existence 49,787 establishments engaged in the manufacture of food products. (R. 389) The retail food bill of the United States is twenty-four billion dollars annually, of which three billion dollars represents the estimated value of products consumed at the place of production. (R. 691) The remaining twenty-one billion dollars of food is marketed through more than 400,000 retail food outlets (R. 519 and 773).

The food industry is not only of great magnitude from the standpoint of value of production, but also from a territorial aspect. Food is produced on more than 6,000,000

farms in the United States and this source of food supply is supplemented by enormous daily imports. In the nature of things food must be produced in all sections of the country from year to year and from season to season. Foods are largely perishable and the Nation lives upon daily supplies and not upon accumulated reserves.

The total dollar sales of appellees include sales of inedible as well as edible products. Swift's sales of edible products in 1929 amounted to $816,250,000 (R. 954) and Armour's $723,808,394 (R. 938). Although these amounts are large in themselves, they are insignificant when compared to the twenty-four billion dollars representing the Nation's annual food bill.

The changes which have occurred in the food industry during recent years were commented upon in *Wolff v. Industrial Court*, 262 U. S. 522, 538:

> "In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. * * * There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply * * * are country-wide, * * * and the danger from local monopolistic control less than ever."

The fact is recognized, both by marketing authorities and business men, that radical changes in competitive conditions have occurred during the past ten years in the manufacture, and in the wholesale and retail selling of foods (R. 519-20, 692, 704).

Among the major changes which have occurred in the food industry are:—

(a). The organization, and particularly the tremendous growth, of regular chain store organizations which function as retailers, wholesalers, and manufacturers of foods.

(b). The organization and development of voluntary chain store organizations which function as retailers, as wholesalers, and to some extent as manufacturers of foods, and,

(c). The organization and growth of large food manufacturers and distributors of food products directly to retailers.

(2) THE GROWTH OF REGULAR CHAINS.

The parties to this cause stipulated that in 1920 there were in existence in the United States 15,000 regular chain grocery stores having sales in that year of $770,000,000, and that by 1929 the number of stores had increased to 60,000 with sales of $3,500,000,000. These 60,000 chain grocery stores are owned by 900 separate corporations and the 70 largest of these corporations own 48,699 stores (R. 567).

The largest chain store organization is The Great Atlantic & Pacific Tea Company. Its sales in 1929 exceeded the sales of either Armour or Swift. Its business has grown from 4,638 stores with sales of $230,420,618 in 1920 to 15,418 stores with sales of $1,053,692,882 in 1929 (R. 494).

The Great Atlantic & Pacific Tea Company now operates stores in 36 States (R. 496). It is not merely an operator of retail food stores, but also a manufacturer. Its present physical properties in addition to 15,418 retail stores include 15 packing establishments under Federal inspection. It had no such plants in 1920 (R. 533). It has 53 general storage and shipping warehouses and had 10 in 1920 (R. 494). It operates 35 bakeries and operated 2 bakeries in 1920 (R. 495). The company had one produce warehouse in 1920 and has 23 at the present time. It also owns and operates 2 butter warehouses, 3 cheese plants,

1 creamery, 1 fish warehouse, 2 laundries, 1 printing plant, 9 general food factories for canning fruits, vegetables, catsup, chili sauce, jams, jellies, macaroni, spaghetti, cocoa, candies, peanut butter, spices and extracts. It also operates 9 milk plants, 7 coffee roasting plants, and 6 salmon canneries in Alaska (R. 495).

The earnings of The Great Atlantic & Pacific Tea Company in the year ended March 1, 1921 were $5,803,333 (R. 496) and for the year ended March 1, 1930 were $26,219,631 (R. 827). Its net worth in 1920 was $22,490,527 and in 1930 was $118,659,567 (R. 827).

The sales of The Great Atlantic & Pacific Tea Company and of each appellee were substantially the same in 1929, all being slightly in excess of $1,000,000,000, but the profits of The Great Atlantic & Pacific Tea Company in 1929 were $26,219,631 (R. 827) as compared with Swift's profits of $13,077,000 and Armour's profits of $9,811,000 (R. 888a). In 1929 the Atlantic & Pacific earned 2.49 per cent on sales and 26.08 per cent on investment (R. 827), whereas in the same year Swift earned 1.25 per cent on sales and 5.78 per cent on investment and Armour earned .98 per cent on sales and 3.54 per cent on investment (R. 888a).

The Kroger Grocery & Bakery Co. of Cincinnati, Ohio is the second largest chain store organization in the food industry (R. 567). It operates slaughtering and meat packing establishments under Federal inspection at Cincinnati and Columbus, Ohio, and a sausage plant at Detroit, Mich. (R. 501). It operates 12 bakeries, 5 dairies, a candy factory, a beverage factory, a coffee roasting plant, a packing plant for olives and other bottled goods (R. 501) and 16 warehouses (R. 828). Its business has grown from 903 stores with sales of $50,705,896 in 1920 to 5,575 stores with sales of $286,611,715 in 1929 (R. 502 and 828). The net worth of the company has increased from $7,695,229 in 1921 to $51,722,895 in 1930 (R. 828). In 1929 its earnings were $5,919,097 representing 2.07 per cent on sales and 13.08 per cent on investment (R. 828).

Safeway Stores, Inc. has grown from 784 stores and sales of $50,536,513 in 1926 to 2660 stores and sales of $213,496,255 in 1929. Its earnings have increased from $371,761 in 1922 to $6,147,313 in 1929, representing 2.88 per cent on sales and 22.85 per cent on investment (R. 829). The company owns and operates 44 warehouses, 15 bakeries, 3 creameries, and a candy factory (R. 565).

American Stores Company had 1223 stores in 1920 and 2644 stores in 1929. Its sales were $103,059,303 in 1920 and $143,346,157 in 1929 and its earnings increased from $2,249,454 in 1920 to $6,594,822 in 1929 (R. 830). The company operates 8 bakeries, 8 wholesale warehouses, a milk plant and a fruit and vegetable canning plant (R. 564).

First National Stores, Inc. was incorporated December 28, 1925. It operated 1717 stores in 1927 and 2659 stores in 1930. Its sales were $48,976,740 in 1926 and $107,635,216 in 1930 (R. 831). The company has 3 manufacturing and distributing plants, one of which contains a bakery having a capacity of 52,000,000 loaves yearly (R. 565, 831).

The financial record of other large grocery chain organizations appears in the record at pages 826a to 828. Each and every organization shown earns substantially more on sales and on investment than any of the defendant packers (R. 826a-828).

(3) THE GROWTH OF RETAIL FOODS OUTLETS CONTROLLED BY VOLUNTARY CHAINS.

During the last decade, and especially during the last five years, there has also been a remarkable growth in the number and in the business of the so-called voluntary chain stores operating in the food industry. The voluntary chain is defined in the record as:

> "a group of independently owned retailers who cooperate in joint buying, joint advertising or in joint or group control of the operations of their retail stores in retail management." (R. 509)

There are three groups or classifications of voluntary chains. The most important group is that which is sponsored by wholesale grocers who obtain concentration of purchases from a group of retailers in return for merchandising and managing assistance which enables the retailers to operate their stores more efficiently. (R. 509) The second group of voluntary chains is what is commonly called a retailer-owned wholesaler, being a regular wholesale grocery company having a capital stock owned entirely or largely by retail grocers (R. 509). The third group consists of organizations in which a number of retail grocers combine for the purpose of group buying, or group advertising, but without ownership of wholesale grocery facilities (R. 509).

There are in existence at the present time 551 voluntary chain organizations with a total membership of 59,640 (inadvertently stated as 29,000 in the court's Op. R. 1046), separate retail grocery stores (R. 510). The growth of voluntary chain stores in the food field has been even more rapid than the growth of regular chains (R. 510-11) and the principal growth has been during the last 5 years (R. 519).

The largest voluntary chain store organization is the Independent Grocers' Alliance of America commonly known as the I. G. A., which was created in 1926 (R. 762). The organization embraces 49 wholesale grocers with 87 wholesale establishments, and approximately 9,000 retail stores doing a yearly business of about $526,000,000 in 37 different states (R. 762).

The Red and White Corporation, organized in 1921, is an affiliation of 30 wholesale grocers having from 60 to 70 wholesale establishments and a retail membership of from 8,000 to 10,000 stores of which 4,000 or 5,000 are located in Canada (R. 783).

At the present time about 25 per cent of the total retail grocery business of the United States is done by the 60,000 retail members of the 551 voluntary chain organizations.

Approximately 35 per cent of the total retail grocery business of the United States is controlled by the 60,000 retail stores owned by approximately 900 regular chain store organizations (R. 519). Therefore at the present time 60 per cent of the retail grocery business of the United States is in the hands of approximately 1,500 chain organizations.

(4) THE GROWTH OF MANUFACTURERS AND WHOLESALE DISTRIBUTORS OF FOODS.

The chain store development of the last ten years has been accompanied by tremendous growth in concerns manufacturing and selling food products directly to retailers (R. 520, 701). In addition to the powerful chain organizations there are now in existence many general food corporations having greater financial strength and greater earning power than any of the defendants.

National Dairy Products Corporation was incorporated in December, 1923. It is an operating and holding company and has 73 subsidiary corporations (R. 839-40). The business of the company includes the wholesale and retail distribution of milk, cream, butter and other dairy products and the manufacture and wholesale distribution of sausage, ice cream, beverages, condensed milk, butter and milk by-products (R. 499 and 839). The company is rated as the largest manufacturer of ice cream in the United States (R. 499). Its sales in 1924 were $91,064,305 (R. 842) and in 1929 $300,000,000 (R. 500). In May of 1930 the company acquired the Kraft-Phenix Cheese Corporation and the sales of that company in 1929 were $80,000,000 (R. 500).

The earnings of National Dairy Products Corporation were $4,882,238 in 1924 and $21,574,240 in 1929 (R. 842). This represents a return of 7.19 per cent on sales and 32.51 per cent on investment. The company's net worth was $9,703,773 in 1924 and $110,603,066 in 1930 (R. 842).

The Borden Company commenced business in 1899 and embarked on an expansion program in 1928. It now has

124 subsidiary corporations engaged in the manufacture and sale of condensed, evaporated, malted and dried milk, cheeses, caramels, mince meat and ice cream and in the purchase and distribution of cream, butter, eggs and other farm produce (R. 846). The sales of the Borden Company have increased from $120,293,572 in 1920 to $328,466,989 in 1929 and its earnings have increased from $2,818,860 in 1920, representing 2.34 per cent on sales and 7.80 per cent on investment, to $20,403,725 in 1929, representing 6.21 per cent on sales and 21.96 per cent on investment. The company's net worth has increased from $36,141,852 in 1920 to $131,874,740 in 1930 (R. 851).

The General Foods Corporation is the successor of the Postum Cereal Company. It commenced an expansion program in 1925 when it acquired the Jell-O Company. Two additional corporations were acquired in 1926, 4 in 1927 and 3 in 1928 (R. 854). In 1929 the name of the company was changed to General Foods Corporation and 12 additional corporations were acquired. As a result of these acquisitions the company now handles 68 different branded products as compared with 6 items dealt in by the predecessor company in 1924 (R. 854-56).

In 1929 General Foods Corporation acquired Batchelder, Snyder, Dorr and Doe Company of Boston, a large meat packing and food establishment which in turn owns through its subsidiary Frosted Foods Co., Inc., the Birdseye Quick Freezing Process (R. 856-7).

The sales of General Foods Corporation have increased from $21,910,177 in 1920 to $128,036,791 in 1929. Its earnings in 1920 were $1,119,902 and in 1929 were $19,422,314 (R. 858). The 1920 earnings represent 5.11 per cent on sales and the 1929 earnings 15.17 per cent on sales. The return on investment in 1921 (the first year as to which the company's investment is shown by the record) was 18.83 per cent and in 1929 was 40.54 per cent (R. 858).

The record contains proof of the growth and financial history of 8 food corporations and shows that their rate

of earnings on sales and on net worth is many times in excess of the present rate of earnings of the defendant packers (R. 838a-866 and 888a).

Counsel for appellants seek to minimize the importance of the tremendous growth of general food corporations on the alleged ground that they are not comparable to the appellees in size. Counsel for the Government say (brief 56-7), that the sales of the largest of these companies are not more than $350,000,000 a year, which is only 35 per cent of the sales of either Armour or Swift. Counsel ignore the fact that the large volume of the sales of meat packers, in dollars, is due to the fact that their raw material, livestock, is costly. The Census of Manufactures for 1927 shows that the total selling value at the factory of the products manufactured at 1250 slaughtering and meat packing establishments was $3,057,215,718, whereas the cost of the livestock, supplies, fuel and power utilized to manufacture those products was $2,663,740,403 (R. 390). In other words the total selling value exceeded the cost of materials by only 14.75 per cent. The comparative sizes of corporations can not be judged by a comparison of their dollar sales unless the corporations are engaged in the same industry. The total sales of the Coca Cola Company in 1929 were only $39,260,813 but its net earnings were $12,758,276 (R. 574), whereas Armour earned less money on sales of more than $1,000,000,000 (R. 888a). The sales of General Motors Corporation in 1929 were $1,504,404,472 and its earnings were $247,317,743 (R. 586), whereas 832 separate meat packing corporations reporting to the Packers and Stock Yards Administration in 1929 earned less than 1/4 of this amount on sales nearly three times as great (R. 817).

M. UNDER PRESENT CONDITIONS THE ACQUISITION OF A MONOPOLY IN THE FOOD INDUSTRY IS NOT POSSIBLE.

The modification of the decree of 1920 permits the defendants to diversify their business in accordance with

modern trends and to handle food items other than meats. In so doing they enter a competitive field radically different from that which existed in 1920. Ten years growth and development of concerns engaged in manufacturing, wholesaling and retailing foods has completely altered the 1920 situation. Instead of the comparatively few chain organizations and chain stores in 1920, there are now approximately 120,000 strongly controlled regular and voluntary chain grocery stores, in control of 60 per cent of the total retail grocery business of the Nation (R. 567, 510, 519). Instead of a Great Atlantic & Pacific Tea Company earning less than half as much as Swift & Company in 1920, there is a new Great Atlantic & Pacific Tea Company earning in 1929 twice as much as Swift, and more than Swift, Armour and Cudahy combined (R. 827). The National Dairy Products Company, earning $21,574,240 in 1929, has replaced a predecessor corporation which earned $761,293 in 1920 (R. 842). National Biscuit Company earned $21,422,357 in 1929 instead of $5,543,120 in 1920 (R. 574, 582). The Borden Company earned $20,403,725 in 1929, compared with $2,818,860 in 1920 (R. 851), and Standard Brands earned $19,820,669 in 1928 compared with $4,680,250 in 1921 (R. 853). The Postum Cereal Company of 1920, with earnings of $1,119,902, emerged as the radically different General Foods Corporation in 1929, earning in that year $19,422,314 (R. 858).

The defendants upon entering the wholesale food business will find that the extent of the selling field is very different than that of 1920. The chain store organizations, controlling 60 per cent of the retail grocery business, do their own wholesaling, and to the extent necessary supplement it with their own manufacturing activities. The 120,000 chain stores will not be generally available to the defendants as customers for groceries, but will continue their present methods of manufacturing foods extensively and buying the remainder from the same source where the

defendants will have to buy, namely, the manufacturers of foods.

Upon embarking in the general food business, the defendants will not only encounter the competition of such strongly entrenched corporations as National Dairy Products Company, the Borden Company, General Foods Corporation, and others, but will find themselves compelled to buy the branded products of these companies. If the defendants are to cater to the public demand for the innumerable Borden milk products, they must of necessity deal with The Borden Company. In order to handle the widely known Fleischmann yeast, Royal Baking Powder, and Chase & Sanborn coffee, purchases will have to be made from Standard Brands (R. 852). Postum Cereal, Maxwell House coffee, Sanka coffee, Walter Baker's cocoa, Jello, Log Cabin Syrup, Calumet Baking Powder, Grape Nuts, Post Toasties, Diamond Crystal Salt, and many other well known products can only be obtained from General Foods Corporation (R. 854-56).

The petitioning defendants since 1920 have demonstrated an inability to hold their own in the meat packing industry in which they have been engaged for many years. Their smaller competitors have forged ahead, both in growth of business and in earning power. It is simply inconceivable that the four defendants, with a background of losses of $61,000,000 in 1921, a reorganization in 1922, a forced sale in 1923, and a bankruptcy in 1924, could now enter the general food business and in any way or to any degree, crush or oppress or threaten or even inconvenience the large and financially powerful corporations now engaged in the food industry. The 1920 monopoly in the packing industry and the 1920 potential monopoly in the food industry, then asserted by the Government to exist, do not now exist,—as a result of changed conditions.

The record proves a lack of power by the defendant packers not alone in the meat industry but also in the general food industry. The petition of 1920 alleged that the defendants had

"set about controlling the Nation's supplies of fish, vegetables, either fresh or canned, fruits, cereals, milk, poultry, butter, eggs, cheese and other substitute foods * * *" (R. 17)

The petition did not pray that the defendants be enjoined from dealing in poultry, butter, eggs or cheese and continuously since the decree was entered the appellees have handled these commodities. The increase or decrease of the appellees' volume of business in these commodities affords a basis for measuring their power or lack of power with reference to food items other than meats.

The United States total production of butter in 1920 was 1,558,380,000 pounds and Swift produced 4.81 per cent thereof. In 1929 the total production of butter was 2,177,027,000 and Swift produced 5.59 per cent thereof (R. 954-5). Armour's production was 6.6 per cent of the total in 1920, and 4.6 per cent in 1929 (R. 942a).

The total consumption of cheese in the United States in 1920 was 405,545,000 pounds and in 1929 was 657,717,000 pounds (R. 955). Swift's sales were 16.60 per cent of the total in 1920 and 11.95 per cent in 1929 (R. 955), and Armour's sales of cheese were 20.0 per cent in 1920, and 10.0 per cent in 1929 (R. 942a).

The total poultry production was 1,310,000,000 pounds in 1920 and 2,323,000,000 pounds in 1929 (R. 955). Swift's sales decreased from 5.73 per cent in 1920, to 5.12 per cent in 1929 (R. 955), and Armour's from 4.8 per cent in 1920 to 3.0 per cent in 1929 (R. 842a).

The total egg production in 1920 was 1,607,000,000 dozens and in 1929 was 1,951,000,000 dozens (R. 956). Swift's sales were 5.35 per cent of the total in 1920, and 6.20 per cent of the total in 1929 (R. 956). Armour's sales were 4.2 per cent of the total in 1920, and 3.4 per cent of the total in 1929 (R. 942a).

The Government contends at page 33 of its brief that the appellees have "pursued an aggressive expansion

policy'' since 1920, and to substantiate this claim states that Swift and Armour have purchased numerous produce concerns during the last ten years. In spite of the acquisition of these produce plants, during this ten year period the business of Swift decreased in cheese and poultry and increased but slightly in butter and eggs; the business of Armour in butter, eggs, cheese and poultry has substantially decreased since 1920. The produce plants were acquired in an effort to retain the appellees' volume of business and the attempt has, on the whole, been unsuccessful.

There is no lack of food production in this country. On the contrary, for the past ten years public attention has been sharply drawn to the plight of those who have produced a surplus in crops such as grain, fruit and vegetables. In recent years Congress has enacted many laws designed to solve difficulties of over-production and inadequate distribution of food crops. The Capper-Volstead Act (42 Stat. 388) relieves farm cooperative organizations from the provisions of the anti-trust laws in marketing their products. The Agricultural Marketing Act (46 Stat. 11), is designed to promote the effective merchandising of agricultural commodities and to protect, control and stabilize commerce in the marketing thereof. This statute created the Federal Farm Board to carry out the purposes of the statute and an appropriation of $500,000,000 was placed at its disposal. Vast sums have since been expended by the Board but it is, at least, debatable whether this Federal agency, supported by Congress and having unlimited power and tremendous resources, has been successful in controlling prices even as to comparatively few agricultural commodities. If the Federal Farm Board, under present conditions, with the vast resources of the Government back of it cannot control prices there is little likelihood that either of the appellees can do so.

Overproduction of food was illustrated by H. C. Merritt, Jr., and George N. Pharr who testified that in California the equivalent of 7,000,000 cases of No. 1 peaches out of a total crop of 20,000,000 cases fit for canning, were allowed to rot. This was accomplished by a control agreement under which the co-operative growers were paid by the canners for the 7,000,000 cases which were permitted to rot, so that the canning industry and these growers would not be injured through the marketing of a surplus (R. 424, 714). Naturally, these witnesses were strongly of opinion it was necessary to get additional distribution, both foreign and domestic; that were there more dependable marketing outlets for canned fruits, a greater range of advertised brands, and more intensive and wider sales effort, whereby more retail customers and dealers could be reached more frequently, it would go far toward providing a remedy for their problems of overproduction, inadequate distribution, and waste of valuable foods (R. 424; R. 714).

The decree of 1920 restrains the defendants from dealing in canned vegetables (R. 156). The Government witness, James Moore, President of Snyder Packing Corporation at Rochester (R. 788), testified that there are from 2,500 to 2,700 fruit and vegetable canners in the United States operating from 3,500 to 4,000 separate canneries (R. 792). He testified that if the packers should manufacture canned goods—

> "I can see no way in which they would have any advantage in the production viewpoint over the small canner because in the nature of canning, the crops have to be grown in separate localities spread all over the country. The canning units are necessarily small. The raw material, especially vegetables, can not be transported long distances and I can see but little, if any, advantage for the packers regardless of their resources, if they attempt to pack in very large volume, as compared with the individual canner who is packing only the individual volume that is consistent with his little territory surrounding the hamlet where his canning factory is situated (R. 791-2).

Mr. Moore further testified that in former years his concern sold its output directly to wholesalers, but that at the present time only 60 per cent of the volume is sold to wholesalers, and 25 per cent to retail chain stores, and 15 per cent to other retail organizations having sufficient volume to buy directly (R. 792).

Frederick S. Snyder, former Chief of the Meat Division of the United States Food Administration, and now President of Batchelder, Snyder, Dorr & Doe Company of Boston (R. 457), testified:

> "I would say that it is impossible under present-day conditions for any group of men in the food industry to acquire a monopoly of the food industry of the United States." (R. 467-8)

Dr. Paul H. Nystrom, Professor of Marketing at Columbia University (R. 690), testified:

> "With conditions as they are today I do not see the possibility of the elimination of competition, or the crushing of competitors, in the food industry. In the first place, the large number of concerns that are in the business preclude that possibility. In the second place, the relative ease with which new concerns may be established, or expand its present activities or capacities, and the resistance that would be met by any concern seeking to restrict competition by coercive measures from the distributive organization, as well as the consumers themselves who if an attempt were made to force them to buy any such product at prices that might seem unreasonable, would very quickly change, in my opinion, to other diets, to other foods, and adjust themselves so they would not purchase the articles that were produced or marketed by an organization attempting a restriction of competition and whatever goes with that. I do not think that it is possible for any concern or group of concerns to maintain artificial and arbitrary prices in the food industry." (R. 696)

To the same effect is the stipulated testimony of Dr. H. H. Maynard, Professor of Marketing, Ohio State University (R. 703) and Dr. Fred E. Clark, Professor of Marketing, Northwestern University (R. 704).

From the evidence in the case the District Court quite properly found as a fact:

> "That if defendants were to engage in handling food products additional to products they are now dealing in, there is no probability that they could or would acquire a monopoly of, or control the quantity and prices of, the foods produced and/or consumed in the United States." (R. 1112)

V. The Exclusion of the Appellees as Competitors in the General Food Industry is Injurious to the Public and Unjust and Inequitable to Appellees.

We have demonstrated that active and extensive competition now exists in both the meat packing industry and the general food industry, and that the danger of a food monopoly which the Government feared in 1920, does not now exist. A court of equity should not continue the prohibition of a lawful act—the selling of food—after the necessity for the prohibition has ceased. Proof of this present lack of necessity is of itself sufficient to require an affirmance of the modification granted by the trial court. Proof of the further fact that the exclusion of the defendant-packers as competitors in the food industry is injurious to the public, and unjust to defendants, is not an essential prerequisite to modification, but is an additional reason why modification should be granted by a court of equity.

A monopoly does not now exist in either the meat packing industry or the food industry and that fact having been both proved and admitted, there is no reason why the public at large should be deprived of the benefits of an increase of competition in the food industry. The fact that

the public in general is injured by a substantial restraint of competition in an essential industry is not reasonably debatable. "* * * lower prices or improved service are almost an inevitable result of an increased competition." (Dr. Paul H. Nystrom, R. 695).

The decree prevents defendants from doing a lawful act though there is no longer any necessity for the prohibition and the unnecessary prohibition of any lawful act constitutes a legal prejudice. Moreover, the record shows beyond dispute that because of changes in conditions, the appellees are being subjected to reductions in profits and constantly increasing cost of operating branch houses and car routes, which can only be obviated by handling a diversified line of products. The effect of changed conditions on the appellees' distributing system and the extent to which the appellees are being injured cannot be appreciated without a knowledge of the nature of and necessity for this distributing system.

Approximately 70 per cent of the nation's livestock is produced west of the Mississippi River whereas approximately 70 per cent of the consuming population is located east of the Mississippi River (R. 418, 485). National packers must have an adequate distributing system in order to move the surplus of meat from the area of overproduction to the area of consumption and to give their customers daily supplies of a perishable commodity. This distributive system, indispensable to the business of a national packer, consists of branch houses and car routes.

A branch house is an establishment used to sell meat at wholesale to the surrounding trade area. The physical properties of a branch house consist of a building containing refrigerator space, dry storage space, loading and unloading docks, office space and space for the storage of delivery equipment. Some branch houses are also equipped with smoke houses and machinery for making sausage and slicing bacon (R. 654).

On November 1, 1929, Swift & Company owned and

operated 431 branch houses and 5509 refrigerator cars (R. 956). On September 1, 1930, Armour and Company had 391 branch houses and on November 2, 1929, had 6766 refrigerator cars (R. 943-4). The Armour branch houses represent an investment of $26,307,257 and are operated by 9,924 employes at an annual cost of $30,000,000 (R. 654).

Refrigerator cars are used in shipping meats to branch houses and to car lot customers and also in the operation of car routes. A car route is a group of towns located along a railway line in territory too sparsely populated to warrant the operation of a branch and too remote from existing branch houses to be economically served by them. Salesmen solicit orders in these towns and deliveries of meats are made from refrigerator cars commonly called route cars which travel along the railroad line on regular schedules, stopping at each town to unload the meats previously ordered (R. 665).

The earning power of this large and costly distributing system owned by appellees and essential to the future conduct of their business, has been gravely affected by the unforeseen revolutionary changes which have occurred in food distribution since 1920.

Prior to 1920 chain grocery stores were a relatively small factor in the distribution of food products and an altogether negligible factor in the sale of meats at retail. The recent growth and development of the general food stores (R. 692, 520) have resulted in an enormous increase in the sale of meats by chain organizations. In 1920 there were 15,000 regular chain grocery stores with 1200 fresh meat departments and by 1929 the number of stores had increased to 60,000 and the number of fresh meat departments had increased to 15,800 (R. 567). This growth in the total number of stores is a 300 per cent increase but the growth in the number of fresh meat departments represents an increase of 1216 per cent.

The growth of the general food stores selling meats as

well as groceries, is also proved by the statistics of 70 individual chain organizations shown at pages 567-568 of the record. The first store of The Great Atlantic & Pacific Tea Company containing a fresh meat department was opened in 1924 (R. 494) and by 1929 the company was operating 3,851 combination stores containing fresh meat departments (R. 567), and its meat sales in that year aggregated $110,082,602 (R. 496). The Kroger Grocery & Baking Company operated 276 combination food stores in 1920 and 3,191 combination food stores in 1929 (R. 502) and its sales of meats increased from $7,313,140 in 1920 to $51,984,005 in 1929 (R. 724).

The voluntary chain grocery stores are a development of the last five years (R. 519) and there are now approximately 60,000 such stores (R. 519) and it is estimated that 46.7 per cent of the total or approximately 28,000 stores have fresh meat departments (R. 512, 517).

There are also 3,632 chain meat stores, 2,075 chain restaurants and cafeterias and 523 chain hotels (R. 569).

Summarizing the foregoing, chain organizations control at the present time more than 50,000 retail outlets for the sale or consumption of fresh meats. This rapid growth in the number of chain retail meat outlets has brought about a tremendous concentration of buying power in the field of retail meat distribution to the detriment of appellees.

Chain store buying of meats is not done by local store managers but through a central office. The meats are usually shipped from the selling packing plant to a chain warehouse from which distribution is made to the organization's stores located in the district served by the warehouse (R. 655). This new method of doing business does not have an adverse effect on a meat packer not maintaining a branch house system but conforms to his usual method of doing business. In the case of appellees it causes a loss of volume in branch houses and this result follows regardless of whether the appellees or other pack-

ers secure the chain store order. In either case the meat does not pass through the branch house because of the direct shipment and branch house volume is therefore reduced (R. 656).

A further change of major importance affecting the appellees is found in the ever-increasing extent to which chain organizations are performing packing house operations. The Kroger Grocery & Baking Company is an outstanding example of a chain store engaged in the operation of packing plants. The Kroger Company operates slaughtering and meat packing establishments at Cincinnati and Columbus, Ohio, and a sausage plant at Detroit, Michigan. The plant at Columbus has been opened since 1920 (R. 501).

The converse of the Kroger situation is illustrated by the entry of meat packers into the retail field.

In 1926 Adolf Gobel, Inc., a large meat packer with plants in New York, Washington, D. C., Mason City, Iowa, and other places embarked in the retail field by acquiring the Merkel chain of 30 meat stores having sales of more than $2,000,000 a year (R. 551-2).

Hygrade Food Products Corporation was organized in 1927 and acquired 9 concerns engaged in the packing and food business. The company also acquired the five American packing plants formerly owned by Allied Packers, Inc., located at Chicago, Detroit, Buffalo, Wheeling and Topeka. On February 11, 1928, this meat packing company entered the retail field by acquiring the Bronx Provision Company including a chain of retail stores (R. 879).

Frye and Company of Seattle, Washington, a slaughterer and meat packer, operates 64 retail stores. The total annual sales of Frye & Company are $12,000,000 of which $3,000,000 is sold at retail (R. 532).

Carstens Packing Company, a slaughterer and meat packer with plants at Tacoma and Spokane, operates 48 retail stores and 40 per cent of its products are disposed of at retail (R. 532).

When a chain store organization engages in slaughtering, or a packing company engages in retailing, the retail outlets supplied by the meats thus produced are completely lost to the appellees as possible customers. The Kroger Grocery and Baking Company produced in its slaughtering establishments in 1929 meat and meat products having a wholesale value of $10,464,362 (R. 724). This product was sold through the Kroger retail stores and neither the appellees nor any other packer had an opportunity to compete for that business.

The most profitable part of the packing industry is the processing of meats (R. 1036a, 528, 622, 656, 682), and this field of the industry has been substantially invaded by chain store organizations. Chain organizations are now operating 30 processing plants under Federal inspection as compared with 8 such plants operated by them in 1920 (R. 533). The record contains a list of 83 chain store organizations which perform meat packing operations (R. 921-936).

When a chain organization engages in processing rather than slaughtering, the appellees and other packers still have an opportunity to sell that organization carcass meats, but the chain itself performs the most profitable part of the packing operations. (R. 469; 622). That the processing is the most profitable, slaughtering the least profitable, part of the packers' business was shown by the testimony of a number of witnesses. No contradiction was attempted. Illustrative is the clear testimony of F. Edson White, of Armour and Company:

> "Processing is really the productive end of our business so far as profit is concerned. We get our profit through the processing of our products. And to the extent that our customers take over the processing, we miss that profit, and we find, in this growing development of this great merchandiser called the chain store, that he is taking over, to a greater or lesser extent, these functions which have been a part

of our business, and produced the greater portion of our profits. The chain store today will buy meat in pickle, or may buy it green and pickle it themselves. If it is bought in one way or the other, it is shipped to their warehouse, and they do the processing. They smoke the hams and boil the hams. In some instances they even have gone so far as to manufacture sausage. Those are functions that properly belong to the packing business. At least, that is what the packing business has been built up upon, and when we find that sort of a development, we are denied a very large part of our profits in the handling of our business." (R. 622. Also see R. 528, 656, 682)

Other factors than the growth of chain store meat business have operated to cause a reduction of the defendants' branch house volume. The enormous increase in hard roads and motor truck transportation (R. 418) has caused single unit meat dealers located in small cities to motor to nearby large cities for their purchases of meats. The development of motor truck transportation has also caused meat jobbers in large cities to extend their trading area. This has resulted in a decrease of branch house volume especially in branch houses located in small cities which are near large cities (R. 655). Marlboro, Mass., located 25 miles from Boston, is an illustration of this development. Armour and Company operated a branch house at Marlboro for many years and acquired an additional branch house at that point as a result of the Morris purchase of 1923. Under modern transportation conditions the retail meat dealer located in Marlboro can motor to Boston for his supplies and the jobber located in Boston can serve the Marlboro district by truck delivery. As a result of this change in conditions, together with the growth of chain stores in Marlboro, Armour and Company was compelled to close both of its Marlboro branch houses and does not operate any branch house in that city at the present time (R. 655).

The injury to appellees' branch house system has been

observed by its competitors. Frank A. Hunter, President of Eastside Packing Company at East St. Louis (R. 425) testified:

> "I think the trend of trade advantage is rather against the large packer as compared with the small one because of the development of chain store buying in carload lots. * * * We think that the branch house system of doing business is not so good any more under the present trend." (R. 427-8.)

Frederick S. Snyder, who has had 43 years experience in the packing and food industry, testified at length regarding the effect of changed conditions on the appellees' branch house system. He said in part:

> "Referring to the advantages of the small packer over the large packer, the small packer, having a business in a locality where his chief market is within, say, 100 miles of that locality, is giving concentrated attention to his business in that section. In the presence of a surplus of stock which he feels he must move at any time, he utilizes the services of brokers all over this country and abroad, if he has a product that is made for foreign use, or of such character that it can be used both abroad and here, and disposes of it without the burden of carrying the branch house system which the leading packers must necessarily have. The carrying of that distributive outlet throughout the United States is a very serious burden and is becoming a more serious burden as time goes on, to the leading packers. (R. 458-9) * * *
>
> "The rapid changes in the methods of distribution at retail, are changing very rapidly the use of the branch house system which the packers have developed. I have seen the development of that branch house system and have been witnessing its decline in recent years. The leading chain stores are purchasing in carload lots direct either from the principal packers or from the intermediate packers, shipping to their own warehouses, cutting in their own warehouses for the particular requirements of their

own retail stores, distributing the product with their own trucks, including not only their fresh meats, but groceries, so spreading the overhead of delivery, and side-passing any use of the packers' branch house for that purpose. Of course, the retail merchants have been diminishing in numbers steadily since the development of the chain store form of merchandising and will continue to do so, very probably, for some years to come, with a corresponding increase in the development of the chain store system, which is more efficient, of course, than the system which it is, in part, replacing. * * * (R. 459.)

"I think we are only on the threshold of chain store development. If it continues as in the past four years, as I should suppose, it will continue to diminish the amount of merchandise going through packer branch houses, and, further reducing the spread of their overhead, and decrease the relative importance of the senior four packers as compared with the intermediate packers, because the intermediate packer can ship carloads of meat to chain store smokehouses just as well as Armour and Swift can, and it will mean a constant movement toward retrenchment on the part of the packers to protect their capital. They must find new methods to deal with the situation or change their whole method, because they cannot go on unendingly with the rising tide of business diverted from them and not make changes to meet that situation. (R. 474) * * *

Mr. Snyder is president of Batchelder, Snyder, Dorr, and Doe Company of Boston, which is engaged in the business of selling perishable food products in both meat and other lines (R. 457), and if the appellees are permitted to compete in the general food industry, his company will have increased competition to contend with. Mr. Snyder said on this subject:

"Mind you, when I take this position in which I feel that the present situation is improper, in view of the very radically changed conditions, both with respect to impending developments and those which be-

gan four years ago, but are continuing to expand, I am saying that against my own personal interest. But I think in the long run, we suffer from the lack of a fair field and no favor principle. I think we all will get on further and be further 25 years from now if in the interim we work on the principle of a fair field and no favor rather than have part of our organizations in this country shackled. I think it is inevitable that these new conditions of distribution will entail a multiplicity of new problems which will affect the defendants very markedly. They should be free to deal with them." (R. 472)

The Government contends, however, (Brief, pp. 46-7) that there has been no reduction in the proportion of the appellees' branch house business as compared with their total business in edible products. Counsel ignore, however, the all-important question of profits. Branch house volume has been substantially maintained by the appellees but only at the expense of a substantially increased cost of doing business. The appellees having lost a large volume of business normally done in their branch houses have naturally and of necessity endeavored to obtain new customers to replace lost volume and this has been accomplished largely by the solicitation of small orders formerly ignored by them. In 1920, Armour and Company's branch house volume was 3,000,000,000 lbs. for which there were 19,400,000 sales tickets. In 1929 the company's branch house volume was 2,800,000,000 lbs. and 21,900,000 sales tickets were required to handle this reduced volume (R. 656). The size of Armour's branch house orders has decreased from 156 lbs. per sales ticket in 1920 to 126 lbs. per sales ticket in 1929. This has resulted in an increased selling cost per order.

There are certain substantial branch house expenses such as rent, taxes, insurance, management and bookkeeping that are fixed and are not reduced because of a loss of volume (R. 655). It costs as much for a branch house salesman to obtain a 126 pound order as it would cost to

obtain a 156 pound order. Bookkeeping expenses and management expenses are the same for small orders as for large orders and delivery expense is not appreciably less. (R. 656)

Swift & Company's sales in branch house and packing house markets show a decrease in the size of orders ranging from 117 pounds per sales ticket in 1923 to 93 pounds per sales ticket in 1930 and this has resulted in an increase in the expense of doing business from $.845 per cwt. in 1923 to $.991 per cwt. in 1930 (R. 958a).

The results in dollars and cents as to Swift & Company are shown by the operations of 19 branch houses located in the territory adjacent to New York City. During the 8-year period from 1920 to 1927, 15 of these branch houses were operated at a profit and the remaining 4 sustained losses aggregating $5,549. During the two years, 1926 and 1927, 14 were operated at a profit and 5 branch houses sustained losses aggregating $16,425.01. During the years 1928 and 1929, only 6 branch houses were profitable and 13 sustained losses aggregating $123,001.20 (R. 960).

The increasing sale of meats by chain stores has also adversely affected the appellees' car route distributing system. In 1920 practically all sales in appellees' car route territories were made to single unit retail meat dealers and the chain store meat business was insignificant. At the present time there are located in Swift's car route towns 7,000 chain stores of which 1900 are handling fresh meats. Nearly all of the 7,000 stores handle smoked meats, butter, eggs, cheese, oleomargarine and refinery products. This chain store development in the retail meat business in car route towns has occurred principally during the last three years (R. 666). With it has come the usual centralized buying direct from packing plants and many single unit stores which formerly were served by appellees' car routes, have been replaced by chain stores (R. 667).

The development of hard roads and motor truck transportation have also affected the appellees' car route business. Prior to this development, competition in the average car route territory was limited to local slaughterers and packers in the immediate vicinity, local packers' branch houses and other packers who shipped by car route. The building of hard roads has caused many small packers to increase the scope of their activities. The hard roads enable them to make rapid deliveries in territories which formerly were not accessible to them (R. 670).

The obligation of appellees to guarantee railroad companies a minimum revenue or tonnage per car, which is hereinafter discussed, requires an even flow of volume in car route territories in order to avoid penalties. Regular schedules must be maintained for car routes because customers naturally insist upon knowing when they can obtain their requirements. When a salesman calls on a dealer, the dealer wants to know definitely when the car will arrive. Therefore route cars must be sent out on schedule regardless of whether they do or do not produce the required minimum of tonnage or revenue (R. 666).

As a result of the development of chain store meat business in car route territories, the appellees in an endeavor to maintain service and volume have been compelled to solicit the business of smaller dealers who were not formerly canvassed (R. 669). This has resulted in an increased number of small orders. Swift's average weight per car route order has decreased from 206 pounds in 1923 to 165 pounds in 1929 (R. 958a). This reduction in the size of orders has resulted in an increase in the expense of doing business from $.90 per hundred weight in 1923 to $.95 per hundred weight in 1929 (R. 958a).

In 1925 Swift & Company sold to 65,000 customers in car route territories and in 1929 on account of the increase in small orders, there were 83,000 customers. Before 1925 an order for less than 100 pounds in car route territories

was unusual and it was against the policy of Swift & Company to accept such orders (R. 669). The loss of volume resulting from chain store meat sales forced a change in this policy and in 1929, 35 per cent of Swift's car route orders were for less than 100 pounds each. This has resulted in increased delivery expense, increased credit losses and further freight penalties because of railroad requirements of the payment of a minimum freight charge on 100 pounds per order (R. 669-70).

In 1925 Swift & Company shipped 8,146 route cars out of its East St. Louis plant and the volume of business done was 106,948,000 pounds (R. 667-8). In 1926 a number of chain store warehouses were established in the car route territories and the service was reduced to 7,000 route cars with a total of 93,000,000 pounds. In 1927 there was a further reduction to 6,700 cars and in 1928 to 6,400 cars and in that year the tonnage amounted to 75,000,000 pounds (R. 668). In 1928 Swift & Company paid to railroads $57,000 in freight penalties because it was unable to load its East St. Louis cars to the prescribed minimum weight. A radical readjustment was required and in 1929 the number of cars shipped was reduced to 4,341 (R. 668).

The Government does not deny that modification of the decree will enable appellees to effect economies in the operation of their branch houses and car routes, but contends that the very fact that savings can be thus accomplished, is a reason why the decree should not be modified (Brief, pp. 45-6). The petition of 1920 alleged that the defendants' distributive facilities, intended primarily for the sale of meats, were employed with comparatively no increase of overhead in the distribution of substitute foods (R. 17). The Government, therefore, contends that the situation today is no different than it was in 1920 and that a so-called competitive advantage which then existed, still exists and that, therefore, the decree should not be modified. There are two answers to this argument.

The first answer is found in the fallacy of assuming

that the changes in fact which are required to justify modification of an injunctive decree, must be found in the action prohibited instead of in the basis upon which the prohibition was issued. The theory of the 1920 petition was monopoly and fear of monopoly and nothing less than that could have justified the Government in requesting that a court prohibit five corporations from competing in an essential industry. Concededly, there is now no monopoly in the packing industry and clearly this record shows there is no possibility that such a monopoly or a monopoly in the food industry can now be acquired by the defendants or by anyone. The basis for the injunction against the handling of foods other than meat no longer exists, and that being true, modification of the decree cannot be denied upon the ground that the prohibition which had the effect of depriving the appellees of a means of economical operation in 1920, has a similar effect at the present time. This method of economical operation was not prohibited because it was economical, but because of an alleged monopoly and fear of monopoly.

The second answer to the Government's argument is that any transportation advantage which the appellees may have had in 1920, has disappeared as a result of changed conditions. This fact is overwhelmingly established by the proof, and is discussed in the next division of this brief.

Appellees should not be compelled to continue to incur losses in the sale of meats merely because of a desire that the price of groceries may not be reduced by increased competition. The destruction of economy of operation by the appellees is no longer justified.

The record contains a vast amount of testimony regarding the buying power of a quantity purchaser. Because of the advent of the chain store in the retail meat business this buying power is now exercised against the packing industry. (R. 423, 470, 650, 622)

Oscar G. Mayer, President of Oscar G. Mayer & Com-

pany, testified that when his company sells to a chain organization, it is compelled to sell on a lower basis than to other customers, and that it is a general practice among packers to give the quantity buyer a lower price (R. 422). He further testified:

> "As to buying power, I think the buyer is practically always in a stronger position than the seller, because of the large reserve supply of meat in the United States. The industry carries at the peak of its accumulation period, say late in April, as much as 750,000,000 pounds of meats in storage in coolers. The packers are always put to it to dispose of this supply. (R. 423) * * *
>
> "A person who has a buying power of 5 per cent of the available supply of meat is in a very advantageous position. A man who has an available buying power has a definite advantage in the meat trade on account of the huge reserves and the willingness of the packing industry to sell its products at all times." (R. 424)

There is no doubt that both Swift and Armour are subject to the necessity of selling on a lower basis to chain organizations. Sales of meats to a single chain organization by Swift & Company amounted to $18,913,632 in 1928, and $22,183,744 in 1929. Its total sales to all chains were $71,550,000 in 1930, and in 1930 Swift & Company's sales to its largest chain customer aggregated $21,104,350 (R. 622, 650, 641).

Armour and Company's sales to chain customers amounted to $63,400,000 in 1928, $73,700,000 in 1929 and $85,400,000 in 1930, and its 1930 sales to its largest single customer amounted to $25,027,836, or 29.3 per cent of its total chain store business (R. 939).

There are various concerns engaged in the food industry that sell to single customers large percentages of their total output (R. 719). They also may be compelled to grant quantity discounts to these large purchasers, but

the granting of a quantity discount by General Foods Corporation, which earns 15.17 per cent on sales (R. 858) is a radically different thing from the granting of a quantity discount by Swift & Company earning 1.26 per cent on sales, or by Armour and Company earning .98 per cent on sales (R. 888a). There is nothing to indicate that these general food concerns are gratified because modern conditions have produced customers of such magnitude that they are in the position to exact a quantity discount. Furthermore, the appellees are burdened with a costly branch house system and during recent years have witnessed a substantial increase in branch house expense and at the same time are confronted with this quantity buying which exacts a discount below the usual price level. The appellees, however, are not requesting the elimination of the quantity discount exacted by chain store buyers but are only asking for permission to do that which their competitors are doing.

Many intermediate and small packers whose problems are not nearly as acute as that of the appellees have followed the modern trend by engaging in the business of selling general food products. There appears in the record a list of 140 meat packing concerns that are now selling articles which the defendants are prohibited from handling (R. 909-920). Counsel for the National Association claim (Br. p. 42) that if the appellees are permitted to do likewise "the future of the independent meat packer is precarious," but numerous competitors of appellees testified in support of modification of the decree and the appellants did not produce any meat packer witness to prove that the appellees' competitors share the apprehension entertained by the National Grocers Association for them.

The modification of the consent decree granted by the trial court will in a large measure remedy the existing difficulties with respect to branch houses and car routes. The handling of grocery items in branch houses will re-

sult in increased sales volume and a reduction in sales expense. Fixed charges will not be increased. Delivery equipment will be used to greater capacity and delivery costs will not be increased proportionately. Existing salesmen will be utilized to solicit business for a diversified line instead of for meats alone and the present overhead of branch houses and car routes now charged against meats alone will be distributed over a variey of products (R. 657). In the case of car route business similar savings will be effected and increased volume will enable the defendants to render better and more uniform service and to reduce the payment of freight penalties (R. 671).

Frederick S. Snyder testified on the subject of the solution of the appellees' difficulties:

> "The only salvation for the big packer is to fill up his obsolete branch house facilities to capacity by handling other lines and having freedom to move the same as the next hundred packers do." (R. 474.)

T. Henry Foster, President of John Morrell & Company (R. 548), Dr. Paul H. Nystrom, Professor of Marketing at Columbia University (R. 694-5) and Harold H. Maynard, Professor of Marketing at Ohio State University (R. 704) also testified to the advantage and necessity of diversification by the appellees.

The parties stipulated and agreed that 83 livestock producers and officers of producers' associations would testify if called that in their opinion the livestock industry would be benefited if the large meat packing companies were permitted to sell food stuffs other than meats so that the cost of distributing meats might be shared by other foods (R. 560-64).

VI. Under Present Conditions the Use of Appellees' Refrigerator Cars to Transport Commodities Other than Meats Will Not Give Them Any Unfair Advantage Over Their Competitors.

A. THE PRESENT SUPPLY OF REFRIGERATOR CARS.

The petition of 1920 charged that the defendant packers operated 90 per cent of the total route cars used in the packing industry (R. 13) and implied that the supply of refrigerator cars was not adequate. A large number of Appellees' competitors testified that they now have no difficulty whatever in obtaining all the refrigerator cars they need for the operation of their business.* After this proof had been made the parties agreed to a stipulation,

> "* * * that the supply of refrigerator cars in the United States, whether owned by the defendants or other meat packers, private car companies, or common carriers is adequate to afford an ample supply of refrigerator cars at any time to any who need them and are in a position to use them." (R. 508)

The number of refrigerator cars owned by Armour and Company (including Morris & Company) has decreased from 7,908 in 1920 to 6,766 in 1929 (R. 944). Swift & Company had 7,113 refrigerator cars in 1920 and 5,509 in 1929 (R. 956).

The Government's brief (p. 69) states that Swift operates over 5509 route cars and Armour over 6766. If it was the intention to give the impression that the companies operated that number of car routes the statement is erroneous. The figures are for the number of refrigerator cars owned by the respective companies. Armour and

*Oscar G. Mayer (R. 421), Frank A. Hunter (R. 426), Andrew P. Miller (R. 430), David G. Madden (R. 433), George L. Heil (R. 437), Harry A. Schanz (R. 440), Thomas W. Talliaferro (R. 444), Henry Neuhoff (R. 452), Joseph P. Murphy (R. 454), Paul W. Trier (R. 457), John W. Rath (R. 549), William E. Price (R. 550), T. Henry Foster (R. 545). The company represented by the last witness owns 400 and leases 200 refrigerator cars (R. 545).

Company operates 317 car routes (R. 944) and Swift & Company 1014 (R. 956).

B. ROUTE CAR SERVICE.

The Appellants contend, however, that if the Appellees are permitted to engage in the business of selling groceries they will have an unfair advantage over the interveners in that the Appellees, through the operation of route or peddler cars, will obtain expedited service and procure quicker and more certain deliveries of groceries than the concerns engaged in the wholesale grocery business. The record does not substantiate the claim that the railroad transportation service available to the Appellees is any more expeditious than that procurable by any other shipper (R. 675). In fact the evidence is directly to the contrary and shows that refrigerator cars do not move any differently than non-refrigerator cars in so far as rapidity or frequency of movement is concerned. The route cars operated by the Appellees are placed in local freight trains (R. 665) and moved on regular schedules without preferential treatment over any other type of car (R. 675).

The Government claims (brief page 50) that the Interstate Commerce Commission has found that shipments in refrigerator cars are handled more expeditiously than those in the ordinary merchandise cars. *National Wholesale Grocers Association v. Director General,* 62 I. C. C. 375, *decided June 22, 1921,* is relied upon. That decision involves the legality of the action of carriers in permitting meat packers to load groceries in peddler cars and the Commission said in part:

> "Certain of the packers' peddler cars as above indicated move several hundred miles upon a weekly schedule. The wholesale grocer on the other hand ships to points within a radius of only 100 miles in a daily merchandise car. If the time occupied in movement from the point of production or distribu-

tion to the point of consumption is controlling, it would seem that as to the greater part of his business the grocer has an advantage. (P. 385 of 62, I. C. C.)

"On the other hand a merchandise car routed straight through to one destination would often be in transit less time than a peddler car in reaching the same destination, but peddling en route. (P. 387 of 62, I. C. C.)

"It seems clear that the merchandise car and the packers' peddler car or branch house car move in the same trains and that the principal delay occasioned to the shipment of the wholesale grocers is due to the manner of handling their shipments through the carriers' freight houses. They now have available the station order car which is similar to the packers' peddler cars. If this car were availed of in the same manner and to the same extent as the packers' peddler car it is not seen in what way complainants would be prejudiced." (P. 402 of 62 I. C. C.)

C. THE CONSTRUCTION OF HARD ROADS AND THE GROWTH OF MOTOR TRUCK TRANSPORTATION.

Whatever the situation may have been in 1920, it is clear that any possible advantage to the shipper in route cars has been entirely eliminated since then by the construction of hard roads and the development of motor truck transportation. Surfaced roads in the United States have increased from 387,457 miles in 1921 to 662,435 miles in 1929 (R. 418). Roads surfaced with concrete, asphalt, macadem and similar materials have increased from 36,038 miles in 1921 to 112,454 miles in 1929 (R. 418). The effect of this increase in hard roads subsequent to the entry of the decree has been to increase the number of motor trucks in use in the United States from 979,904 in 1921 to 3,379,854 in 1929 (R. 418).

The business of the wholesale grocer is particularly adapted to the use of the motor truck in making deliveries. Wholesale grocers, with the exception of a comparatively few nation-wide institutions, do business within

a small area. The 5,919 wholesale grocers doing business in the United States are located in 2,349 different cities (Petitioner's Exhibit 88, not printed, R. 1172-3). This congestion of wholesale grocers indicates the necessarily narrow limit of their selling field and that most of their customers can be reached by motor truck. Petitioner's Exhibits 83 and 84 (not printed, R. 1173) show the large extent to which wholesale grocers are now utilizing the motor truck as a means of transportation. The use of trucks enables them to expedite their deliveries to any extent they desire.

The Government attempts to answer this point by stating (brief, pp. 49-50) that transportation by auto truck is advantageous only for distances up to 125 miles while route cars *often* travel as much as 600 miles. The record does not justify the statement that route cars *often* move that distance. It shows only that 600 miles is the limit of practical operation (R. 666). However, even if it were correct it would not answer the point we are making because the radius of the wholesale grocers' area of distribution is about 125 miles and not 600 miles (62 I. C. C. 375, 380, 385). As they have truck service within their radius of distribution they cannot possibly be hurt by the operation of peddler cars.

The increase in motor truck transportation has been so extensive and rapid within the past few years that it has become a menace to the railroads. The subject was considered by the Interstate Commerce Commission in the *Fifteen Per Cent Case*, 178 I. C. C. 539, decided October 16, 1931, and the Commission said at page 574:

> "Movement by truck is a new form of competition which has been developing with great rapidity. It has been principally effective on less-than-carload traffic and relatively short hauls of such commodities as livestock, cotton, cement, sand and gravel, gasoline, fruits and vegetables and general merchandise; but it is continually extending to more and more traffic

and for longer distances, as trucks and trailers are enlarged and highways improved. At present it is aided by prevailing low prices for gasoline and rubber and the over-supply of labor. In addition to rates, advantages which it offers to the shipper are in rapid and flexible service, store-door receipt and delivery, the transportation at carload rates of much smaller lots than are possible by railroad and elimination of costly railroad packing requirements. The carriers introduced evidence to show that it would be feasible for the trucks to divert only a comparatively small amount of additional tonnage even if rates were increased. But without exaggerating the menace of this form of competition we are convinced that the carriers have underrated it and that its possibilities are materially greater than they are prepared to concede."

At page 34 of the American Association brief counsel admit the change in conditions since 1920 with respect to transportation,

> "It may be true that the petitioners do not have to the same extent advantages over wholesale grocers and others who distribute by truck as they had when they and their competitors all used railroad transportation."

Counsel then proceed to complain of the use of trucks by Appellees to supplement their car routes, but the fact remains that the transportation advantage claimed to have existed in 1920, has been removed by the increased use of the motor truck and the increase in the number of refrigerator cars available to all. The trial court made the following finding of fact on this subject:

> "17. That during the past ten years, (a) the increase in the number of railroad refrigerator cars, not owned by the defendants, available to all who need to use such equipment in their businesses, has resulted in there now being ample equipment of that charac-

ter for any and all who need them; (b) the increase in the use of motor trucks for the transportation of food products and the extending of the areas of their operation by reason of the great increase in good roads, and the increase in the transporting by motor trucks of products by packers competing with defendants and by wholesale grocers in making deliveries to their customers, have combined to deprive defendants of any advantage which the ownership of refrigerator cars formerly gave them, and none of the defendants enjoys any undue preference or advantage by reason of its ownership of refrigerator cars." (R. 1113)

The evidence in the case fully supports this finding.

D. MINIMUM CHARGES ON ROUTE CAR SHIPMENTS.

The Appellants contend that if the Appellees are permitted to handle groceries they will derive an advantage over wholesaling grocers in that the Appellees will be enabled to eliminate penalties now imposed where meat shipments in peddler cars are less than the required minimum. It is difficult to appreciate any justification for a claim that the removal of an existing handicap will give the Appellees an advantage over concerns not now subjected to a similar handicap. The Appellees have proved that they are being subjected to the imposition of freight penalties and they have shown that if permitted to handle general foods it will be possible to reduce such penalties. To the extent they are successful the result will be to place the Appellees upon a basis of equality with the wholesale grocers as it is not contended that they are now being subjected to the imposition of penalties.

Petitioner's Exhibit 173 (not printed, R. 1173) consists of the tariffs of various railroads throughout the country containing the route or peddler car rules in effect in the different freight classification territories which cover the United States, namely, Central Freight Association, Eastern Trunk Line, New England, Southern, Southwest-

ern, Western Trunk Line, and Trans-Continental and Inter-Mountain territories. The rules in these various territories differ but they are all designed to accomplish the same purpose, namely, to assure the carrier that on each peddler car shipped it will receive a certain minimum revenue. Grocery articles may be used in making up this minimum in the Central Freight Association, Southern, and Southwestern territories, but may not be used in making up the minimum requirements in the Eastern Trunk Line, New England, Western Trunk Line, or Trans-Continental and Inter-Mountain territories (Petitioner's Exhibit 173 not printed). Therefore the contention that the avoidance of a penalty constitutes an improper advantage can have no possible application except in the three territories first named. Nor can it have any application in those territories to peddler cars containing enough fresh meat and packing house products to make up the required minimum.

The rules of all territories provide that the shipper of the peddler car shall bear the expense of ice and reicing the car and of billing, loading and cleaning. None of this expense is borne by a shipper who delivers his perishable products to the carrier's freight station for shipment in one of the regular scheduled refrigerator cars of the carrier. This is referred to in the opinion of the Interstate Commerce Commission in *National Wholesale Grocers Association v. Director General*, 62 I. C. C. 375, at page 384:

> "The packers assume the cost of loading at point of origin, the cost of reicing, the sum necessary to meet the minimum charge and the expense due to ownership of the car. These four items of expense aggregating from 33 to 36 cents per hundred pounds in addition to the freight rates, are not paid by the grocers upon shipments of less-than-carload traffic."

J. A. Revelle, Assistant Manager of Swift & Company's Car Route Sales Department (R. 665), testified to the

decrease of business in car route territories because of the growth of chain meat stores and the enlarged area of the activities of small packers brought about by the development of good roads. The witness testified that this lack of tonnage resulted in the payment of penalties on numerous peddler cars which might be avoided if the company were permitted to handle grocery articles (R. 671, 673). A part of his testimony upon an assumed state of facts is quoted at page 32 of the brief of the American Association

> "For instance if we assume that the minimum is 10,000 pounds and the rate is $1 a hundred, 8,000 pounds at that rate would come to $80 but we would still have to pay $100 to move it in that car. We could then without paying any more money, put enough groceries or any other specific products up to 2,000 pounds in that car to raise the rate up to $100 without paying out any more total revenue on the car."

Counsel did not quote the explanation made immediately thereafter by the witness:

> "I think we must make a distinction. I do not want to get this confused in your mind at all. This does not relieve us of any freight charge at all,—it relieves us of a penalty." (R. 674.)

The inference drawn from the assumed case put to Mr. Revelle ignores the fact that on a shipment of 8,000 pounds at $1 per hundred pounds with a minimum requirement of 10,000 pounds, the rate on the 8,000 pounds because of the penalty of $20, becomes $1.25 per hundred pounds. If this situation should occur in a territory where grocery articles may be used in making up the minimum requirements, the inclusion of 2,000 pounds of groceries in the car at a rate of $1.00 per 100 pounds would simply bring the rate back to the normal $1 per hundred pounds. The less than carload rates are paid upon the groceries

as well as the other articles in the car, and if 5,000 pounds of groceries had been added to the car instead of 2,000 pounds, the total paid upon the groceries would have been $50 or a total of $130 for the car, which is $30 in excess of the minimum of $100 per car. The shipper of a peddler car with only 8,000 pounds of freight, containing, for instance, some canned meats, is at a distinct disadvantage from a rate standpoint as compared to a wholesale grocer shipping the same quantity of canned meats through the carrier's freight station to the same destination. The shipper of the peddler car would pay $1.25 per hundred pounds on the canned meats, while the wholesale grocer would pay only $1 per hundred pounds. The right of the shipper of the peddler car to include enough other products in the car to avoid the payment of the penalty charge simply places him on an even basis from a rate standpoint with the wholesale grocer shipping the canned meats through the carrier's freight station.

The Government in its brief (page 66) refers to the testimony of one wholesale grocer to the effect that he could not compete with Armour and Morris in the sale of canned milk because they ship milk in refrigerator cars which are underloaded and "the meat carries the load" so that they can undersell him by the amount of his transportation charge (R. 787). The witness referred to was J. T. Griffin, President of the Griffin Grocery Company, Muskogee, Oklahoma, and the Griffin Goodner Grocery Company of Tulsa, Oklahoma. The two companies together operate 13 branch houses and do a combined business of $7,500,000 per year. The Griffin Company manufactures peanut butter, preserves, jellies and candies and roasts coffee. The manufacturing business amounts to $600,000 to $700,000 per year. About 95 per cent of their groceries are delivered to retailers by trucks. The truck deliveries have come on gradually with better roads during the last ten years (R. 787).

In referring to the shipment of milk in refrigerator

cars the witness said, "They (referring to Armour and Morris) ship it together with their meat, and they have a minimum, say, of 10,000 pounds. If they have only 7,000 pounds of meat, they can throw in the milk, I understand, and it costs them no freight on the milk. That is the meat carries the load." (R. 787) It is hard to believe that the Government seriously contends that the appellees pay no freight charges on shipments of milk, groceries or any other articles in peddler cars, yet their reliance upon loose testimony of this kind leads to that conclusion. Milk shipped in peddler cars pays the less than carload rate the same as if shipped through the carrier's freight station. All products in the car carry the load, *i. e.*, the freight charges, and not merely meat.

A number of witnesses for the Government were asked questions which assumed that the shipper of a peddler car avoided the payment of freight charges on grocery articles loaded into a peddler car containing not enough weight to make up the minimum charge (R. 782, 787, 790). Upon this assumption these witnesses said that such a situation would be detrimental to their business. The assumption contained in the questions, namely, that the payment of freight would be avoided, is clearly fantastic and the conclusions of the witnesses are erroneous.

The argument of Appellants is not sound as applied to peddler cars because all shipments in such cars pay the less-than-carload rates. There is nothing unusual in shipping different articles in the same car where any minimum tonnage or revenue is required and the shipper is permitted under the railroad's mixing rules to load a variety of articles in the car to make up the minimum. It results from the system of rate-making in the United States providing for less-than-carload and carload rates, minimum weights, minimum charges and mixing rules. The argument of Appellants, if carried to a logical conclusion, would require the abolition of all less-than-carload and carload rates, all minimum weights and charges and

mixing rules and in lieu thereof the establishment of a system of any quantity rates without restrictions. In this way every shipper could be placed upon a basis of absolute equality but the Interstate Commerce Commission does not approve any quantity rates because they encourage uneconomical operation (*Southern Class Rate Investigation,* 100 I. C. C. 513, 642). Furthermore, the law does not attempt to equalize fortune, opportunities or abilities (*Interstate Commerce Commission v. Diffenbaugh,* 222 U. S. 42, *Ellis v. Interstate Commerce Commission,* 237 U. S. 434, *United States v. Illinois Central Railroad,* 263 U. S. 515).

The wholesale grocers, who are objecting to the packers shipping groceries in their peddler cars, now have the privilege, under the railroads' mixing rules, of shipping a wide variety of articles in mixed carloads, and in this way securing carload rates upon small quantities of the various articles. Rule 10 of the Official Classification permits all articles rated fifth class to be shipped in mixed carloads at the fifth class carload rate. *Consolidated Classification Case,* 54 I. C. C. 1, 16. The following is a partial list of articles rated fifth class:

Canned Peas	Canned Pork & Beans	Rivets
Canned Beans	Canned Sauer Kraut	Linseed Oil
Canned Fruit	Condensed Milk	Corn Syrup
Canned Meats	Soap	Pickles
Canned Rice	Table Sauces	Borax
Canned Hominy	Sandwich Spreads	Paints
		Bleaching Powder
		Nails

That the above articles are rated fifth class in official classification territory appears from the following decisions of the Interstate Commerce Commission:

Central Leather Co. vs. A. C. & Y. Ry. Co., 159 I. C. C. 56, 60.

In Re Matter of Suspension of Western Classification, 51, 25 I. C. C. 442, 532.

Sar-A-Lee Co. vs. A. C. & Y. Ry. Co., 120 I. C. C. 513.
Rate Structure & Investigation, Part 6, Iron and Steel Articles, 155 I. C. C. 517, 532, 592-3.

It will thus be seen that wholesale grocers handling these articles may ship a keg of nails, a box of soap, a barrel of linseed oil, a can of paint, and a case of canned fruits in a mixed carload of the above articles and in this way secure the fifth class carload rate upon these small shipments, while dealers handling only those respective lines, shipping the same quantities, would have to pay the less than carload rates. This is a real advantage to wholesale grocers because in this way they secure carload rates on less than carload quantities, while that situation does not obtain with respect to shipments in peddler cars because the less than carload rates are paid upon everything contained in the car. They would lose this advantage if the principle for which they are here contending should be made applicable to their shipments.

From an economic and car conservation standpoint, the argument of Appellants is obviously unsound. Car conservation and heavier loading is the goal constantly sought by the railroads for the purpose of promoting efficiency and economical handling. The lower court realizing this situation, said in its opinion:

> "As to the peddler cars it is an extreme measure unless absolutely necessary, to prevent any one from making an economic use of his facilities. The use by the packers of vacant places in the peddler cars and in their warehouses not used for meats, by other commodities, is sound as an economic and business proposition." (R. 1057-8.)

E. DECISIONS OF THE INTERSTATE COMMERCE COMMISSION.

The decree of 1920 prohibited the defendants from handling the articles enumerated in Paragraphs 4 and 5 of the decree, but did not prohibit competitors of the de-

fendants from handling those articles. There are at least 140 meat packers in the United States who deal in articles which the defendants can not handle because of the 1920 decree. (R. 909-920)

Proceedings were instituted before the Interstate Commerce Commission by both of the interveners, and in the case of *National Wholesale Grocers Association vs. Director General, Alabama & Vicksburg Railway Company, et al.*, and *Southern Wholesale Grocers Association vs. Southern Railway Company, Director General as Agent, et al.*, 62 I. C. C. 375, the Interstate Commerce Commission passed upon the question now sought to be argued for the second time before a different tribunal. Petitions in intervention were filed in said proceedings by numerous wholesale grocery associations, by the appellees herein, and by seven other meat packers: John Morrell & Company, T. M. Sinclair & Company, Jacob E. Decker & Sons, Rath Packing Company, Iowa Packing Company, George A. Hormel & Company, and Kingan & Company. The interveners in this case contended in that case that the packers, meaning not only the appellees but all packers, should not be permitted to ship grocery articles in their peddler cars. In its decision rendered on June 22, 1921, the Commission held, p. 403,

> "Upon consideration of all the facts of record we find (1) that the practices of defendants in permitting the meat packers to load certain articles of groceries in their peddler and branch-house cars is not shown to result in undue prejudice to complainants or unduly to prefer the packers."

The American Association contends (Brief pp. 30, 31) that this decision of the Interstate Commerce Commission was influenced or brought about by the consent decree. Whether this is so or not, can be determined by an examination of the Commission's opinion. The opinion covers 30 pages. A little more than one page is devoted

to a discussion of the consent decree. The rest of the opinion is devoted to a discussion of the facts bearing upon the issues from a transportation standpoint under the Interstate Commerce Act, and the decision is based upon those facts and the law, and not upon the consent decree. This clearly appears from the first sentence of the Commission's conclusions, found on page 401:

> "Whether within the meaning of the interstate commerce act the transportation of the unrelated items in the packers' peddler cars unduly prefers the packers and unduly prejudices the complainants, who load or unload their freight from cars on private sidings at their own expense or through the freight houses of the carriers, must depend upon the usual test in cases involving discrimination, namely, whether the conditions of transportation are substantially similar in the two cases."

It is true that the defendant packers endeavored to have the case disposed of without the entry of any order by the Commission, on the ground that the decree accomplished what the grocers were seeking in the case before the Commission. (R. 1012) The Southern Wholesale Grocers Association (now the American Association) filed a motion with the Commission that its complaint be placed upon the suspense docket pending the carrying out of the terms of the decree. The National Association did not concur in the motion and insisted upon going forward with the case, because (a) the consent decree did not cover all the articles it wished excluded from the cars, (b) other packers not bound by the consent decree were handling the grocery articles and announced their intention to continue to do so and to increase the lines they were handling, and (c) it feared the decree might be in some way evaded. (R. 1018, 1023.)

The Commission ignored the contention of the four defendant packers, denied the motion of the Southern Whole-

sale Grocers Association, and decided to proceed with the case in accordance with the request of the National Association. Having come to this conclusion, the Commission was legally bound to base its decision on the evidence relating to transportation conditions. The case affected other packers not bound by the consent decree, and it clearly would have been error for the Commission to have been influenced by, or to have based its decision upon the consent decree, which applied to only five packers.

It seems clearly apparent that the Commission gave no consideration to the Consent Decree in reaching its decision from the following quotation from its decision found on page 382:

> "The extent of the dealings of the packers in these other commodities is not for us to condemn or approve. We are to consider the connection of the packers with these commodities from a transportation standpoint."

Clause B of Paragraph 2 of the answers of the American Wholesale Grocers Association to the Swift and Armour petitions for modification (R. 323, 335) allege that as a result of the entry of the decree, the appellees herein were enabled to and did intervene in the case before the Interstate Commerce Commission reported in 62 I. C. C. 375. This allegation is erroneous because the orders permitting intervention were issued on September 3, 1919, as to Swift, and on September 5, 1919, as to Armour. (R. 680.) The decree in this case was not entered until February 27, 1920.

Peddler car rules have been before the Interstate Commerce Commission in a number of cases. The last decision of the Commission involving these rules was rendered on July 14, 1930, in the case of *Swift & Company, et al. vs. Akron, Canton & Youngstown Railway Company, et al.*, 167 I. C. C. 355. The rules involved in that case

were those in effect in Central Freight Association territory. Prior to this decision, the minimum charge was computed on the basis of 20,000 pounds at the fresh meat carload rate to the final destination of the car, and some carriers in this territory did not permit the revenue on grocery articles to be used in making up the minimum. The Commission reduced the minimum charge to 12,000 pounds at the third-class rate from point of origin to final destination, and further held that the rules were unreasonable to the extent that they excluded as a credit against the minimum charge per car the revenue on articles other than fresh meats and packing house products. The Commission's finding in this respect appears upon page 364 of the decision:

> "We further find that the rules governing the transportation of fresh meats, packing-house products, and other articles transported in peddler cars are and for the future will be unreasonable to the extent that they require or may require as minimum revenue per car an amount in excess of charges based on 12,000 pounds at the third-class rate from point of origin to final destination of the car, and to the further extent that the rules exclude or may exclude as a credit against the minimum charge per car the revenue on other articles shipped in the same car."

It thus appears that the Interstate Commerce Commission, which has jurisdiction of this subject, has held as late as July 14, 1930, that it is not only proper in Central Freight Association territory to load grocery articles in peddler cars and use the revenue on them to make up the minimum charge, but that rules which forbade this being done were unreasonable and should be changed.

VII. There is no Foundation in Fact for the Claims of Alleged Contumacious Conduct and Violation of Anti-Trust Laws by the Appellees.

Counsel contend that the appellees are not in a position to ask for relief in a court of equity because of alleged misconduct on their part, and that therefore the merits of this controversy should not be passed on.

A. THE CLAIM THAT THE APPELLEES HAVE VIOLATED THE DECREE.

The appellants contend that the appellees have violated the decree by failing to sell all of their stock in stockyard companies and by dealing in commodities prohibited by the decree.

Paragraph tenth of the decree of 1920 directed the defendants to submit to the court a plan for the disposition of their stockyard interests (R. 162-3). The plan was submitted and approved by a decree entered April 12, 1921 (R. 977). Pursuant to this plan, Henry W. Anderson and George Sutherland were appointed as trustees of the court. Irrevocable powers of attorney were executed and delivered to them by the defendants and all of their stock in stockyard companies was placed in the hands of a depositary (R. 977). The appellees endeavored to sell these stocks but were unable to do so and at the suggestion of the trustees, the stock was offered at public sale (R. 995) and was advertised for sale in 28 newspapers but no bids were received (R. 996). The trustees reported to the court on April 8, 1922:

> "* * * the Swift and Armour groups of defendants have made reasonable and sincere efforts to sell said stock and that up to the date of this report their efforts in this regard have been unsuccessful." (R. 997)

On March 21, 1923, Henry W. Anderson as sole trustee further reported to the court:

"Your trustee is advised that in the past year the owners of said stocks have kept up a constant inquiry as to any possible opening which might be presented for the sale of such stock at a reasonable price as provided in said plan, but as yet have been unable to receive any offer for said stocks or any substantial part thereof. During the recent visit of your trustee to said stockyards inquiry was made at every point of bankers, business men and others who might be informed on the subject, including shippers and producers selling on said yards, as to whether it would be practical at this time to sell the stocks of the Swift and Armour groups of defendants in the respective yards in the territory served thereby and the testimony was generally to the effect that such sale would not be practical." (R. 1009)

Because of the inability of appellees to sell their stockyard interests the trial court from time to time granted extensions of time for compliance with that portion of the decree directing a sale of stockyard interests. This continued until May 1, 1925, when the decree as a whole was suspended by order of the District Court. (R. 194). The operation of the decree was restored pursuant to the mandate of this court on July 24, 1929 (R. 195). Swift & Company then filed a petition alleging that notwithstanding diligent efforts, it had been unable to dispose of its interests in public stockyards and requesting an extension of one year within which to effect a sale (R. 196-7).

In the meantime Armour and Company had sold substantially all of its interests in public stockyards for a substantial cash payment and 35 per cent of the common stock of General Stockyards Corporation, the purchaser (R. 629). On July 24, 1929, Armour and Company filed a petition alleging that it had theretofore sold all its interests in stockyards with the exception of the Jersey City Stockyards Company and the Pittsburgh Union Stockyards Company, but that it had not been able to dispose of all of its unrelated lines or its interests in two plants

producing such products. An extension of one year was requested for the disposition of said interests (R. 198-9).

The hearing on these petitions for extensions of time was set for October 2, 1929, and thereafter was continued by the court from time to time until December 19, 1929 (R. 1154-6). In the meantime petitions to modify the decree on the ground of changed conditions had been filed by the appellees and on December 19, 1929, the hearing was postponed until after the petitions to modify had been heard and the time for compliance with this part of the decree was extended until said hearing had been held on the petitions to modify (R. 1157 and 196).

The record, therefore does not support the claim that there has been any disobedience to the decree as to either stockyards or unrelated lines. Counsel for the National Association maintain the contrary and state at page 22 of their brief:

> "That the petitioning packers have never in good faith performed or endeavored to perform the promises they made when they signed the consent decree is established beyond question. As late as February 5, 1930, the Attorney-General, in a communication to Senator McNary concerning the status of that decree, said:
>
> > 'The provisions of the decree, especially with reference to packer ownership of stockyards stock and the handling of unrelated commodities *have never been fully complied with.*' (Italics ours)"

The Attorney General's letter (Congressional Record of Feb. 12, 1930; Vol. 72, Part 4, p. 3495), to Senator McNary is not in the record. Inasmuch as counsel have seen fit to go beyond the record to support their charge, we feel that we are justified in presenting additional information from the same source and we take the liberty of quoting that part of the letter of the Attorney General to Senator McNary, which follows immediately after the single sentence selected by counsel:

"Extensions of time within which to complete such compliance were granted by the court from time to time until May 1, 1925, on which date the operation of the decree was entirely suspended by court order, pending the determination of the rights of the California Cooperative Canneries, who had been permitted to intervene over the Government's objection for the purpose of having the decree vacated. The decisions of the Supreme Court above referred to, and the mandate thereon, entered in the lower court July 24, 1929, terminated the suspension and restored the consent decree to operative effect. This restoration, however, found certain of the packer defendants with large holdings of stockyard stock and so-called 'unrelated commodities' on hand, accumulated or held over during the period of suspension during which the terms of the decree were wholly inoperative. Although now obligated to dispose of those holdings as rapidly as possible, it has been necessary to extend the time within which to complete such disposition in order to afford the defendants reasonable opportunity to do so in accordance with the terms of the decree. * * *

"Because of the extensions of time granted by the court, the defendants have not as yet been guilty of disobedience to the terms of the decree. * * *"

Senate Document 61, 68th Congress, 1st Session, was referred to by the Attorney General in the above-quoted letter. This document contains a report by a previous Attorney General showing the history of the decree up to March 8, 1924. It sets forth in detail the efforts of the defendant packers to comply with the decree by disposing of their interests in stockyards as well as in the unrelated commodities prohibited by the decree. This report shows that the Swift, Morris, Wilson and Cudahy defendants had complied with the decree in disposing of their unrelated lines except that the Cudahy defendants had on hand an interest in a manufacturing plant engaged in the manufacture of fruit preserves and jellies. Regarding the Armour defendants, the report stated:

"The Armour group of defendants had on hand at the date of the entry of this decree in excess of $10,250,000 worth of stock of such unrelated commodities. They have reported to the court that they have disposed of all of these commodities with the exception of a stock, including labels, valued at $3,352. Armour & Co., however, owns interests in five plants manufacturing such commodities, which are located in the States of Washington, Michigan, New York, and Maryland, and has operated such plants for a limited time each season so as to maintain the same as going concerns in order that they might have a better opportunity to sell them, and, of course, procure a better price therefor when sold. Armour & Co. have distributed the products of these plants and have on hand such products of the value of about $1,000,000. Armour has recently filed a petition for an additional extension of time within which to dispose of these plants and the products thereof. * * * (p. 11)

"The Armour group of defendants have also disposed of their holdings in the Freemont Kraut Co., the Lewellyn Bean Co., the Conway Hotel Supply Co., and of about one-half of their holdings, which half amounted to one-fourth interest, in the Louden Packing Co., all of which were engaged in the manufacture or handling of these unrelated commodities. (p. 12) * * *

"This covers, in substance, the procedure under the decree in this case. It is felt that the decree has been completely carried out, with the exceptions of the provisions relating to unrelated commodities and to stockyards, and that the provisions relating to unrelated commodities have been carried out in spirit and that we are now only striving to carry out the letter thereof." (p. 15)

We therefore submit that neither the record, nor the material outside of the record referred to by counsel for the National Association, justify a claim that the appellees have not in good faith endeavored to perform the obligations imposed upon them by the decree.

B. THE CLAIM THAT THE APPELLEES HAVE REPEATEDLY ENDEAVORED TO DESTROY THE DECREE.

Counsel for the National Association charge (brief, p. 33) the appellees with "twelve years of frantic and unceasing effort to destroy the decree." At page 23 of their brief they charge that in 1922 Armour and Company employed "a spurious independent, California Cooperative Canneries, to attack the decree." At pages 18 and 19 of their brief they state:

> "In 1921 disguised as the California Cooperative Canneries, which was then and is now mortgaged to and financed by Armour and Co. (R. 715, 712) they applied to the Attorney General for a modification of the consent decree."

Senate Resolution 211, 67th Congress, 2nd Session, is cited as authority to support this statement. This Senate Resolution requested the Attorney General to report to the Senate "what steps, if any, have been taken to enforce and carry out the terms of said decree." On February 25, 1922, the Attorney General in response to this Resolution submitted to the Senate a report which was printed as Senate Document No. 145, 67th Congress, 2nd Session. This report states that the California Cooperative Canneries Co. had represented to the Department of Justice, that they had been selling their products, consisting of canned fruits, under a contract with Armour and Company, and that the decree had deprived them of this outlet and had decreased competition in the distribution of canned goods. The Attorney General further reported that the California Cooperative Canneries Co. had requested him to petition the Court for a modification of the decree so as to remove the injunction regarding unrelated lines. The Attorney General's report further states:

> "Following such request by the California Cooperative Canneries Co., several other interests including

> canners, manufacturers, some agricultural organizations and individual farmers requested that the decree be so modified. At no time have the defendants or any of them or anyone claiming to represent the defendants or any of them either moved in Court or requested the Attorney General to move in Court for a modification of such decree with reference to unrelated commodities." (pp. 5-6)

A further report of the Attorney General to the Senate under date of March 8, 1924 (Senate Document 61, 68th Congress, 1st Session) discloses that the request of California Cooperative Canneries Co. for modification of the decree was precipitated by the fact that Armour and Company had served notice of the cancellation of the contract between it and the canneries. In this report under date of March 8, 1924, the Attorney General repeated a statement that neither the defendants, nor any one claiming to represent them, had requested a modification of the decree, and the Attorney General further said:

> "No circumstances have come to my knowledge that could create the least suspicion that the decree was not agreed upon and entered in the best of faith; and as to the effects of the decree there is much dispute. It accomplishes certain objects which some interests regard as most desirable and beneficial to the public but which other interests regard as detrimental to the public welfare." (p. 16)

Notwthstanding the reports thus made by the Attorney General, the Government states at page 10 of its brief, "There is some indication that the defendants almost from the time the decree was entered intended to attack it." The appellees sought openly, in proper judicial proceedings, to have the decree vacated by the motions which were passed on by this Court in *Swift & Company v. United States,* 276 U. S. 311. The making of those motions certainly can not properly be characterized as contuma-

cious conduct. The decree of 1920 is an unprecedented decree and its validity was a matter of grave doubt until settled by the decision of this Court.

C. THE CHARGES THAT APPELLEES FAILED TO MAKE A FAIR DISCLOSURE OF FACTS WITHIN THEIR KNOWLEDGE.

The appellants also charge that the appellees have failed to make a full and fair disclosure of relevant facts within their knowledge and several grounds are urged in support of this claim.

Counsel for the American Association (Brief, p. 25) refer to the fact that F. Edson White, President of Armour and Company, and Gustavus F. Swift, Vice President of Swift & Company, both testified that their companies had not made any definite plans as to what they would do if the court permitted them to engage in the business of retailing meats (R. 636 and 647). The Government produced several witnesses who testified that the selling of meats at retail by a meat packer would tend to antagonize his customers and therefore would not be successful (R. 422, 428, 433). If the appellees were to engage in retailing, it might be necessary for them to dispose of all or a very substantial part of their output in this manner and the magnitude of such an undertaking is indicated by the fact that 25,000 retail stores would be required to dispose of the output of Armour and Company (R. 637).

Conditions in the retailing of meats may be radically changed as a result of the recent quick-freezing process (R. 466). Both Mr. White and Mr. Swift explained that they wished to be free to meet new conditions as they developed (R. 634-5, 647) and that definite plans had not been made. Mr. Frederick S. Snyder had the same view on the question, namely, that changed conditions required that the appellees should have freedom of action. He testified on this subject:

> "I am of the opinion that the large packers should have entire freedom of action so that whatever method

is desirable in their own interest to adopt with reference to distribution, that they shall be free to adopt it." (R. 468)

Government counsel charge that the president of Armour and Company plainly intimated that the power to retail "might be used as a club with which to bring to terms an important customer." (Br. p. 68.) Mr. White testified that the very fact that the privilege of retailing existed might remove the necessity of ever having to do it. His testimony on this subject at page 635 of the record discloses that his theory was that the large chain organizations in purchasing meats from Armour and Company enjoyed greater independence in bargaining than would be the case if they knew that Armour and Company might itself engage in retailing.

Counsel for the American Association emphasize the fact (Br. p. 25) that no showing was made by appellees with reference to conditions existing prior to 1920. Obviously an application to modify an injunctive decree on the ground of changed conditions must deal with conditions as they existed at the time of the entry of the decree.

All appellants claim that the appellees failed to make a full and fair disclosure with reference to the earnings of Swift & Company as compared with Armour and Company. The sales of Swift & Company in 1929 were $1,035,263,000 and its earnings $13,077,000 representing 1.26 per cent on sales (R. 888a). The sales of Armour and Company in the same year were $1,004,796,000 and its earnings were $9,811,000 representing .98 per cent on sales (R. 888a). The president of Armour and Company (R. 633) and the vice president of Swift & Company (R. 649) both testified that they had no explanation to offer for this difference in the rate of return on sales and it is contended that this testimony represents a failure to make a full and fair disclosure of facts. Counsel evidently believe that two meat packers whose volume of sales are

approximately the same should earn approximately the same amount of profits and that if they do not, either packer should, upon inquiry be able to explain exactly why one company earns more or less than the other. We direct attention to the following differences in earnings by meat packing companies in the year 1929:

Company	Sales	Profits	Percentage	Record
Wilson and Company	$308,805,000	$2,305,000	.75	(888a)
John Morrel & Co.	94,660,595	3,435,799	3.62	(867)
George A. Hormel & Co.	38,220,212	2,217,397	5.80	(871)
Rath Packing Co.	33,932,253	495,005	1.46	(873)

If the president of Wilson and Company were asked why Morrell and Company made substantially more money than his company on sales one-third as great, he no doubt would be unable to answer. Both concerns are in the same business and sell the same commodities throughout the United States and in Europe. The foregoing table also shows a comparison in the earnings of two packing companies of substantially the same size—Hormel and Company which earned 5.80 per cent on sales and Rath Packing Company which earned 1.46 per cent on sales. If the president of the Rath Packing Company knew the reason for the difference, the presumption is that he would use his knowledge to correct the difference.

We find the same situation in other lines of business. In 1929 the Kroger Grocery and Baking Company earned $5,919,096 on sales of $286,611,214 (R. 575), whereas American Stores Company engaged in the same business, earned $6,594,822 on sales of $143,346,157 (R. 574).

The reasons which might exist for such differences in earnings are infinite in number, and we see no reason why it should be believed that the presidents of Swift and Armour, two competing companies, had sufficient knowledge of the other's business, to enable them to explain the reasons for the difference in profits.

D. RECIPROCITY IN BUYING AND SHIPPING.

The Government has referred in its brief to the Federal Trade Commission proceedings against Waugh Equipment Company and Mechanical Manufacturing Company, involving reciprocity in buying and shipping. A decision was rendered by the Federal Trade Commission in the Waugh case after the entry of the decree appealed from (15 F. T. C. Dec. 232) and the Government has discussed the findings of the Commission in that decision.

The Mechanical Manufacturing Company was liquidated and discontinued business prior to the entry of the decree of January 31, 1931 (R. 803). Swift & Company did not own any of its capital stock (Petitioners' Exhibit 150, not printed, R. 1173).

The evidence in the record respecting reciprocity appears at pages 799-803. The purpose of this evidence introduced by the Government was stated by its counsel as follows:

> "The purpose for which we are offering this is to show the readiness of these corporations to use their business position and control their business to induce the sale of products in which they are interested. In showing this we concede that this reciprocal shipping and buying arrangement is not peculiar to Armour and Swift; that it is frequently resorted to by other industrial concerns, and sometimes to a degree equal to or perhaps greater than any that we have found on the part of Armour and Swift in this case.
>
> "We are not prepared to state at this time that this reciprocal buying and shipping arrangement is in itself and standing alone illegal, but we believe it is relevant to the question of what use will be made of the power of these two petitioning defendants in case they enjoy the business position which might result after a modification of the Consent Decree." (R. 800)

Neither Armour and Company, nor its president F. Edson White, were defendants in the Federal Trade Com-

mission suit against Waugh Equipment Company (R. 802). Armour and Company owned no stock in the Waugh Equipment Company (Petitioners' Exhibit 118, not printed, R. 1173) and less than half of the company's stock was owned by Armour officials. (R. 637)

Reciprocal buying and shipping has never been condemned by any court or commission prior to the decision of the Federal Trade Commission in the Waugh case. While the Federal Trade Commission has found the practice to be an unfair method of competition, the ultimate determination of that question is for the Court (*Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568) and perhaps a different conclusion will be reached when the question comes before it.

The entire subject of reciprocal buying with respect to railroads is now under consideration by the Interstate Commerce Commission (R. 802).

E. ALLEGED VIOLATIONS OF THE ANTI-TRUST LAWS.

The record contains a summary of testimony offered by the Government with respect to the collection of fats in New York City, the sale of meats in certain sections of Texas and Oklahoma, and the service at cost plan of paying for butter fat (R. 805-06). In lieu of incorporating the testimony of the witnesses relating to these subjects into the record, the parties agreed to a summary thereof, consisting of a substantial copy of a portion of the court's opinion. Regarding the practice of following trucks to ascertain the location of customers from whom fats were purchased in New York City, the court said:

> "It does not appear that the acts of Armour and of Swift were any worse than those of their competitors nor that the final agreements were forced upon the others by Armour and Swift but were for the benefit of all". (R. 805, 1051.)

Regarding the sale of meats in certain sections of Oklahoma and Texas, the court said:

> "While the evidence is conflicting on these points, I am inclined to think that these charges are substantially true but there is no evidence that the officials in the main offices of the defendants had any knowledge of these practices, but on the other hand they had forbidden any agreements or arrangements to fix prices. In fact the prices of the different defendants did not coincide." (R. 806, 1051.)

The lack of knowledge of the incidents which occurred in Oklahoma and Texas by any responsible official of the appellees, not only disproves any claim of illegality or misconduct on the part of the corporations, but prevents the application of the equitable doctrine of unclean hands. This doctrine does not recognize mere imputations of guilt based upon technical theories of agency (*Associated Press v. International News Service*, 240 Fed. 983; affirmed 248 U. S. 215; *Hedman Manufacturing Co. v. Todd Protectograph Co.*, 265 Fed. 273, and *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339).

The service at cost plan of paying for butter fat was that each seller of milk should pay a fixed charge for the expense of measuring the amount of butter fat in his milk. Armour and Swift endeavored in 1929 to put this plan into effect (R. 806). The court said on this subject in its opinion:

> "They failed in their attempt and their failure is a significant fact in determining their ability or inability to create a monopoly." (R. 1051.)

On the entire subject of the evidence of alleged unfair practices offered by the Government, the court said:

> "These defendants employ over 100,000 employees; Armour and Swift do each an annual business of over one billion dollars, and have innumerable competitors throughout the country. It would seem that these competitors would be anxious to produce evidence of every instance of unfair competition or practices by

> the defendants, but these are the only instances of which any evidence has been offered. On the contrary numerous competitors have testified to the keen but fair competition existing in the meat packing industry." (R. 1051-52.)

The district court made the following finding of fact on this subject:

> "3. That there have been a few sporadic instances of unfair practices and fixing of prices by the defendants, which are more fully set out in my opinion filed in this case. But that apart from these there exists no contracts, agreements, understandings, combinations or conspiracies among the defendants, or between any two of them, in restraint of trade or commerce among the States; no fixing of prices to be paid by them for live stock, raw materials, or products for resale, bought by defendants or any of them; no fixing of prices at which defendants or any of them shall sell products dealt in by any of them; and no apportioning among defendants, or between any two of them, of territory in which, or customers with whom, they, or any of them, shall conduct business." (R. 1110)

The trial court's opinion states that the burden of proof rested upon the appellees to prove changes in conditions sufficient to warrant a modification and continues:

> "But the fact remains that it was open to the interveners as well as to the government to produce testimony of other similar occurrences if such existed. The government too at the outset read a letter from the Attorney General to the President of the Senate dated July 11, 1930, in which he said:
>
> "It is my intention to present to the court every justifiable argument and fact which tends to the conclusion that the decree should not be modified. I have no doubt that those who are interested in obtaining modification will present to the court all the evidence and arguments which tend to support their position;

and in this way it is believed the facts relevant to the determination of this important matter can most clearly and expeditiously be presented to the Court." (R. 1052.)

The court characterized the three incidents of alleged unfair practices as sporadic by saying:

> "There is some testimony as to certain sporadic cases of unfair practices and fixing of prices." (R. 805, 1050.)

The court was undoubtedly correct in referring to these three minor instances as sporadic cases, in view of the country-wide extent of the appellees' business and particularly in view of the announcement of the Attorney General that he would present to the court every fact tending to the conclusion that the decree should not be modified (R. 1052) In *Industrial Association of San Francisco v. United States*, 268 U. S. 64, this court reversed a decree enjoining the defendants from certain alleged violations of the Anti-Trust Act. The court said at page 84:

> "By the foregoing process of elimination, the interferences which may have been unlawful are reduced to some three of four sporadic and doubtful instances, during a period of nearly two years. And when we consider that the aggregate value of the materials involved in these few and widely separated instances, was, at the utmost, a few thousand dollars, compared with an estimated expenditure of $100,000,000 in the construction of buildings in San Francisco during the same time, their weight, as evidence to establish a conspiracy to restrain interstate commerce or to establish such restraint in fact, becomes so insignicant as to call for the application of the maxim, de minimis non curat lex."

CONCLUSION.

We respectfully submit that in the public interest, and in justice and equity to the appellees, the order of the Supreme Court of the District of Columbia of January 31, 1931, should be affirmed.

Respectfully submitted,

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